88-784

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No. ____

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1988

HENRY EDWARD BRISTOW,
Petitioner,

v.

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE,
Respondent.

Petition For A Writ Of Certiorari To The Supreme Court of Mississippi

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QUESTION PRESENTED

Where the Mississippi Constitution establishes a right to trial by jury in certain civil cases, can the Mississippi Supreme Court abandon well-established constitutional rules and practices of appellate review by invading the province of the jury to compare and weigh the credibility of testimony, drawing inferences, resolving conflicts in evidence, and rendering a result, without abrogating Petitioner's right to the fair administration of justice guaranteed by the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States?

ALL PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

Henry Edward Bristow

Life & Casualty Insurance Company
of Tennessee and its affiliate,
American General Group Insurance Company

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Weschler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review,* 34 Wash. & Lee L.Rev. 1043 (1977) 10

OPINIONS BELOW

The opinion of the Supreme Court of Mississippi dated July 20, 1988, is reproduced in App. A, *infra,* pg. A-1, and is reported in *Life & Cas. Ins. Co. of Tenn. v. Bristow,* 529 So. 2d 620 (Miss. 1988). The unreported order of the Supreme Court of Mississippi dated August 10, 1988, denying the Petition for Rehearing is reproduced in App. C, *infra,* pg. A-11. The unreported order of the Supreme Court of Mississippi dated September 21, 1988, denying the Motion for Clarification or Correction of Opinion and the Motion to Stay Mandate, is reproduced in App. F, *infra,* pg. A-49. The unreported order of the Supreme Court of Mississippi dated October 26, 1988, denying the Motion for Court to Suspend Its Rules and Other Related Relief is reproduced in App. I, *infra,* pg. A-71.

JURISDICTION

The judgment of the Supreme Court of Mississippi was entered on the 20th day of July, 1988. A timely petition for rehearing was filed on the 31st day of July, 1988, and was denied on the 10th day of August, 1988.

This Court's jurisdiction to review the judgment of the court below is 28 U.S.C. §1257 (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following provisions are pertinent to a consideration of the Petition and are set out in their entirety in the appendix:

U.S. Const. amend. V.
U.S. Const. amend. VII.
U.S. Const. amend. XIV.
Miss. Const. art. III, §31.
Miss. Const. art. VI, §150.
Miss. Const. art. VI, §165.

Miss. Const. art. VI, §175.
Miss. Code Ann. §9-3-9 (1972).
Miss. Code Ann. §9-3-27 (1972).

STATEMENT OF THE CASE

Facts Relevant to the Constitutional Questions Presented

In 1969, Petitioner, Henry Edward Bristow (hereinafter referred to as "Bristow") purchased a disability insurance policy from Respondent, Life & Casualty Insurance Company of Tennessee (hereinafter referred to as "Life & Casualty"). Bristow paid premiums on the policy from 1969 to February, 1980, when he fell, at work, from a scissor type scaffold onto a concrete floor. From the fall, Bristow suffered a compound comminuted fracture of the left arm, which required multiple operations, and he developed osteomyelitis. After paying disability benefits due under the policy for two years, on March 16, 1982, Life & Casualty terminated Bristow's disability benefits.

In January, 1983, Life & Casualty filed its complaint in the Chancery Court of Lee County, Mississippi seeking a declaration of its rights and obligations under the disability policy. Bristow applied for, and was granted, a transfer to the Circuit Court of Lee County, Mississppi. Bristow answered and counter-claimed against Life & Casualty based upon bad faith refusal to pay benefits under the policy seeking $50,000.00 damages for emotional distress and $10,000,000.00 punitive damages. After Bristow counter-claimed, Life & Casualty amended its complaint for declaratory relief and sued Bristow to recover for benefits that it had already paid Bristow. A few days before trial, Life & Casualty abandoned its claim to recover for benefits previously paid to Bristow.

The case was tried before a jury and submitted upon special interrogatories. The questions were answered and a verdict rendered in favor of Bristow as follows:

SPECIAL INTERROGATORIES

You, the jury, should answer the rest of the questions in sequence as instructed here. Please answer the first two questions:

1. Do you believe based upon a preponderance of the evidence that Mr. Bristow was able to perform any occupation for which he was reasonably suited by education, training or experience on March 9, 1982?

YES _____
NO X

2. Do you believe based upon a preponderance of the evidence that Mr. Bristow is able to perform any occupation for which he is now reasonably suited by education, training or experience now?

YES _____
NO X

If you answer both questions 1 and 2 above yes, then you should not answer any further questions and you should return these questions as your verdict. If you answer question No. 1 above NO then you should answer the following questions.

3. Do you believe based upon a preponderance of the evidence that Life & Casualty Insurance Company of Tennessee had an arguable or legitimate reason for terminating Mr. Bristow's benefits on March 9, 1982?

YES _____
NO X

If you answer YES to the preceding question, then you should not answer any more questions and you should return these answers as the verdict of the jury. If your answer is NO, then you should answer the following question.

4. Do you believe based upon a preponderance of the evidence that Life & Casualty Insurance Company of Tennessee's termination of benefits constituted a willful and intentional wrong *or* constituted such gross or reckless negligence as to be equivalent to such a wrong?

YES X
NO _____

If you answer NO to the preceding question, then you should not answer any more questions and you should

return these answers as the verdict of the jury. If you answer YES, then you *may* in your discretion award damages as *otherwise* instructed by the court and the form of your verdict shall be in the following form:

We, the jury, find for Edward Bristow in the amount of $ _____ actual damages.

or

We, the jury, find for Edward Bristow in the amount of $50,000.00 actual damages and $6,000,000.00 punitive damages.

The trial judge thereafter entered the following Final Judgment:

This cause having come on for hearing and jury trial on October 7, 1985, upon complaint for declaratory judgment of the Plaintiff, Counter-Defendant, and cross-complaint of the Defendant, Counter-Plaintiff, and oral testimony, and the cause having been submitted to a jury, consisting of Sharon McKissick, and eleven others, and the jury, having returned a verdict in the favor of the Defendant/Counter-Plaintiff, and assessed Defendant/Counter-Plaintiff's damages in the sum of Six Million Fifty Thousand Dollars ($6,050,000.00).

IT IS, THEREFORE, ORDERED AND ADJUDGED that the Defendant/Counter-Plaintiff, Henry Ed Bristow, have and recover of and from the Plaintiff/Counter-Defendant, Life and Casualty Insurance Company of Tennessee, the sum of Six Million Fifty Thousand Dollars ($6,050,000.00), plus eight percent interest per annum from October 11, 1985, being the date of rendition of said verdict, together with all costs herein, for all of which let execution issue.

IT IS FURTHER ORDERED AND ADJUDGED that, Henry Ed Bristow is deemed to be presently totally disabled within the provisions of Life and Casualty Insurance Policy No. 9310750 and Life and Casualty Insurance Policy No. 77562690. ORDERED AND ADJUDGED, this the 14th day of October, 1985.

/s/ Frank A. Russell

FRANK A. RUSSELL
CIRCUIT JUDGE

Life & Casualty appealed the judgment and the Supreme Court of Mississippi rendered its opinion on July 20, 1988, which stated in part:

> By July 30, 1981, the doctor was so pleased with Bristow's progress that he released him from treatment for a period of one year. . . . (App. A, *infra,* pg. A-1).
>
> . . .
>
> As to the alleged "deceitful" wording of the APS mailed to Dr. Freeland by Life & Casualty, even if it were true as Bristow's brief asserts, that any gainful occupation would be understood to mean "any occupation for which some compensation could be paid," [which is far from apparent] the fact remains that the APS contained the same check boxes as its predecessors, . . . (App. A, *infra,* pg. A-1).
>
> . . .
>
> As to the fact that Life & Casualty sent this APS directly to Dr. Freeland instead of through Bristow, we are not satisfied that it has any significance. (App. A, *infra,* pg. A-1).
>
> . . .
>
> We are satisfied that Life & Casualty had an arguable reason for denying disability benefits to Bristow under the policy . . . There is absolutely nothing in the record upon which a finding could be based. This is simply not a case for punitive damages. (App. A, *infra,* pg. A-1).
>
> . . .
>
> The evidence concerning emotional distress was not voluminous. (App. A, *infra,* pg. A-1).
>
> . . .
>
> As to intentional infliction of emotional distress, neither of the two witnesses who spoke to this matter made even an unsupported assertion that Life & Casualty *intended* for Bristow to be made miserable. The testimony of Dr. Thomas does not even speak to the issue of causality at all. (App. A, *infra,* pg. A-1).
>
> . . .
>
> In fact, it is clear from this record that Dr. Thomas never even had seen Bristow before the examination, let alone before the accident. For all he knew, Bristow might have been habitually depressed.
>
> In short, there is no substantial evidence to support

> the award of damages for mental distress. (App. A, *infra*, pg. A-1).
>
> . . .
>
> There being nothing in the record to support either actual or punitive damages, the plaintiff must take nothing. The verdict of the jury must be reversed and judgment rendered for Life & Casualty. (App. A, *infra*, pg. A-1).

The Federal Question Was Properly Presented

When the Supreme Court of Mississippi rendered its opinion of July 20, 1988, the federal question, for which review is now sought, was first at issue. Bristow timely filed a Petition for Rehearing which contained, in part:

> When the totality of the facts and circumstances in this case are considered by rational and fair minded men and women, then the right to trial by jury in this country is preserved. This Court's substitution and interpretation of the facts contrary to the jury in Ed Bristow's case is a violation of all his constitution rights dealing with the right to trial by jury including, but not limited to, the Mississippi Constitution, Article III, Section XXXI; and the Fifth, Seventh and Fourteenth Amendments of the Constitution of the United States; and all rights afforded Ed Bristow under the common law of the United States and of the State of Mississippi. Ed Bristow's right to trial by jury is so basic and fundamental that this Court's reversal and rendering in his case was a clear violation of this basis right.

(App. B, *infra*, pg. A-11). The federal question was created by an unexpected decision of the Supreme Court of Mississippi giving Bristow no prior opportunity to anticipate or assert the federal question. The Petition for Rehearing was the first and only opportunity to present the matter to the court.

The Supreme Court of Mississippi on August 10, 1988, denied the Petition for Rehearing. (App. C, *infra*, pg. A-37). Implicit in the court's ruling is a consideration of and ruling on the federal question presented. The denial of Bristow's

Petition for Rehearing had the legal effect of denying Bristow's asserted rights under the Mississippi Constitution and the Due Process Clause of the Fifth and Fourteenth Amendments.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

In a variety of contexts, this Court has repeatedly ruled that once a state extends a right to its citizens, it may not remove that right on an arbitrary basis. This fundamental right to Due Process applies even where the state-created right being deprived by the state is not independently guaranteed by the U.S. Constitution. *See, e.g., Cleveland Bd. of Edu. v. Loudermill,* 470 U.S. 532, 541 (1985) (public employment); *Zobel v. Alaska,* 457 U.S. 55 (1982) (distribution of "fiscal dividends" to state's citizens); *Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1982) (commission's adjudicatory process); *Hicks v. Oklahoma,* 447 U.S. 343 (1980) (criminal sentencing process); *Memphis Light, Gas, & Water Div. v. Craft,* 436 U.S. 1 (1978) (utility service); *Goss v. Lopez,* 419 U.S. 565 (1975) (remaining in a public school); *Wolff v. McDonnell,* 418 U.S. 539 (1974) (good time credits for prisoners); *Kramer v. Union Free School Dist.,* 395 U.S. 621 (1969) (elections for offices which could have been filled by appointment); *Dice v. Akron, Canton & Youngstown RR,* 342 U.S. 359 (1952) (jury trial of fraud issue). *See also Plyler v. Doe,* 457 U.S. 202 (1982) (free public education); *Philadelphia v. New Jersey,* 437 U.S. 617 (1978) (access to landfills within the state); *Police Dep't v. Mosley,* 408 U.S. 92 (1972) (access to public area for demonstrations); *Shapiro v. Thompson,* 394 U.S. 618 (1969) (welfare payments).

Similarly, the Fourteenth Amendment's Due Process Clause has been interpreted as preventing states from denying potential litigants the availability of established adjudicatory procedures, where such an action would be "the equivalent of denying them an opportunity to be heard upon their claimed rights." *Boddie v. Connecticut,* 401 U.S. 371, 380 (1971); *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 430

(1982). Also, this Court has agreed in *United States v. Kras*, 409 U.S. 434 (1973) that a due process right of access to the courts exists when fundamental interests are presented and the state has exclusive control over "the adjustment of [the] legal relationship[s]" involved. *Id.*, at 445.

The Court's decisions involving the right of access to courts provide analogous methods of analysis to advance the Petitioner's argument in the instant case; and, the relationship between these opinions and the right to due process advanced by Petitioner is made even clearer by reasoning that if the right of access to the courts is not to be denied directly, then it should not be denied indirectly.

The right of trial by jury in civil cases in Mississippi is a right granted and guaranteed by the Mississippi Constitution. Miss. Const. art. III, §31. The first state Constitution, article 1, §28, Const. 1817, provided that, "the right to trial by jury shall remain inviolate." Under this Constitution, in *Taylor v. Sorsby, Walk.*, 1 Miss. 97 (1821), the Mississippi Supreme Court said: "The important right of trial by jury should not be disturbed, unless upon the most unequivocal evidence of injustice to the party who complains; otherwise, the right of the jury would be literally transferred to the courts, and they would instead of the jury, become the triers of facts, in contravention of one of the leading features clearly expressed in our political association." Furthermore, a long line of decisions and several constitutional revisions have reaffirmed this right without variance.

The only power of review that the courts have in respect to the verdict of juries upon findings of fact is that set forth in *Byrd v. State*, 154 Miss. 742, 123 So. 867 (1929), which is that the trial court may set aside or the Supreme Court may reverse in one of only three instances: (1) where the verdict is without the support of any competent evidence; (2) where the verdict is without the support of any reasonably believable proof; and (3) where the verdict is against the overwhelming weight of the evidence. These instances contemplate the existence of *legal facts* upon which the jury is to determine the fate of a litigant's property or liberty. Moreover, the partiality of a jury is not assumed, nor to be

adjudged partial except for strong reasons fairly manifest upon the record. *Williams Yellow Pine Co. v. Henley,* 155 Miss. 893, 125 So. 552, 553 (1930). It will be noted from a comparison of a long line of Mississippi Supreme Court cases that, while the judiciary has the power, when convinced that a judgment is the result of bias, prejudice, passion, or corruption, to set it aside and grant a new trial before another jury, the question is for the ultimate decision of the jury where there is a conflict of the evidence. *See, e.g., Davis v. Temple,* 129 Miss. 6, 91 So. 689 (1922); *Columbus & G. Ry. Co. v. Buford,* 150 Miss. 832, 116 So. 817 (1928); *Mobile & O.R.R. Co. v. Cox,* 153 Miss. 597, 121 So. 292 (1929); *Shelton v. Underwood,* 174 Miss. 169, 163 So. 828 (1935); *Haynes - Walker Lumber Co. v. Hankins, et al.,* 141 Miss. 55, 105 So. 858 (1925). By contrast, the Mississippi Supreme Court dramatically deviated from that rule here, by simply reversing *without* remanding for a new trial.

Contemporary cases apply this power of review through more highly specialized "standards of review". This is evident in the instant case. When the Mississippi Supreme Court reviewed the trial court's decision by putting the record through a two-step test to determine if the question of punitive damages should have gone to the jury. The Supreme Court determined that "there is absolutely nothing in this record upon which a finding could be based. This was simply not a case for punitive damages." *Life & Cas. Ins. Co. of Tenn. v. Bristow,* 529 So. 2d 620, 623 (Miss. 1988). The Court also determined that "there was no substantial evidence to support the award for damages for mental distress." 529 So. 2d at 625. The Mississippi Supreme Court reversed the trial court and rendered judgment for Life & Casualty Ins. Co. Petitioner strongly asserts that, in order to reach this decision, the Mississippi Supreme Court had to ignore the answers to special interrogatories to the jury; and, in fact, ignore or dispute the explicit findings and determinations of the jury and trial judge. For example, the Court engaged in speculation of facts in concluding that "it is clear from this record that Dr. Thomas never even had seen Bristow before the examination, let alone before the accident. For all he

knew, Bristow might have been habitually depressed." *Id.* at 625.

The opinion below, when read as a whole, evidences the willingness of the Mississippi Supreme Court to substitute its judgment on an issue of fact for that of the jury, and, the Petitioner strongly asserts that the opinion, when read in conjunction with the record, clearly evidences an usurpation of the function of the jury to try the facts. *See Dice v. Akron, supra.* Indeed, the verdict of the jury in the instant case was treated by the Mississippi Supreme Court as no more than advisory, both to itself and to the trial court, and, was set aside according to whether it corresponded with what the Court would have found on the facts. Therefore, the form of the jury trial was preserved, but its substance was destroyed. Petitioner strongly asserts that this indirectly denied him the constitutional right to trial by jury; and, the Mississippi Supreme Court proceedings were so fundamentally unfair or deficient that they are inconsistent with the rudimentary demands of fair procedure. *See generally, Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); Morgan, *Playing By the Rules: Due Process and Errors of State Procedural Law,* 63 Wash.U.L.Q. 1, 2, 7-8, 12-21 (1985); Weschler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review,* 34 Wash. & Lee L.Rev. 1043, 1057-59 (1977). The right to trial by jury has been established under state law, and the state cannot indirectly deny the Petitioner this right without violating even the most minimal standards of the Due Process Clause of the Fourteenth Amendment.

Petitioner further asserts that its Motion For Court To Suspend Its Rules Based On Newly Discovered Evidence and all other interrelated relief evidences a failure of the Mississippi Supreme Court to afford the Petitioner the benefit of established procedures in the administration of the instant case; and, this failure rendered the Mississippi Supreme Court proceedings so fundamentally unfair or deficient that they are inconsistent with the rudimentary demands of fair procedure and due process. *See generally,* Morgan, *supra,* at 29; Meltzer, *State Court Forfeitures of Federal Rights,* 99 Harv. L.Rev. 1128, 1138-39 (1986). The informal internal

operating procedures of the Mississippi Supreme Court, as outlined in Justice Anderson's October 1, 1986, article in the "Defense Law Journal" evidences that eight (8) of the nine (9) Justices do *not* read the actual record of a case below. Justice Robertson, who voted to reverse the jury verdict and render the decision in favor of Life & Casualty Ins. Co. of Tennessee, admitted that he had not read the record of the proceedings below. The Mississippi Supreme Court, without having read the transcript of the lower court record, made the following statement in its opinion:

> There is absolutely nothing in this record upon which a finding could be based. This was simply not a case for punitive damages.

When the Court made this statement, without having read the record of proceedings below, it abrogated the Petitioner's due process rights guaranteed by the XIV Amendment of the United States Constitution. To reverse a decision of the lower court without properly reviewing the record of proceedings in the lower court is evidence of bias, passion and prejudice of the Court. Such conduct in the instant case denied the Petitioner the use of established adjudicatory procedures, and such action is equivalent of denying him an opportunity to be heard upon his claimed rights and violates the minimal standards of the Due Process Clause.

CONCLUSION

The opinion below, when read as a whole in conjunction with the record of proceedings of the trial court, evidences an usurpation of the function of the jury to try the facts. The jury verdict was set aside according to whether it corresponded with what the Mississippi Supreme Court would have found on the facts. Petitioner asserts that the form of the jury trial was preserved, but its substance was destroyed, and this indirectly denied him the constitutional right to trial by jury. The right to trial by jury has been established by state law, and the state cannot indirectly deny the Petitioner this right without violating even the most minimal standards of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

Furthermore, Petitioner asserts that the Mississippi Supreme Court reversed and rendered the trial court's decision without reading the record of proceedings of the trial below. This procedure is evidence of bias, passion and prejudice of the Mississippi Supreme Court, and denied the Petitioner the use of state established adjudicatory procedures.

Petitioner strongly asserts that this is the equivalent of denying him an opportunity to be heard upon his claim and violates the minimal standards of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition have been served upon counsel for all parties in this cause by mailing a copy of the same to their office address by regular United States mail, postage prepaid, this the 8th day of November, 1988, as follows: John E. Hughes, III, Wells, Wells, Marble & Hurst, Post Office Box 131, Jackson, Mississippi 39205 and William M. Beasley, Mitchel, Voge, Beasley & Corban, Post Office Box 29, Tupelo, Mississippi 38801.

I further certify that in accordance with Sup. Ct. 28.2, this Petition and Appendix was deposited in a mailbox at the Downtown Branch of the United States Postal Service, located at 351 Twenty-Fourth Avenue North, Birmingham, Alabama, with first-class postage prepaid and properly addressed to the Clerk of the Supreme Court within the permitted time; to-wit: November 8, 1988.

Roy O Parker

ROY O. PARKER, SR.

Sworn to and subscribed before me this the 8th day of November, 1988.

Alicia J Pitt

Notary Public

My Commission Expires:
2-1-92

APPENDIX

The following are pertinent to a consideration of the Petition:

CONSTITUTIONS

United States Constitution:

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U.S. Const. amend. XIV 2a

U.S. Const. amend. VII 2a

Mississippi Constitution:

Miss. Const. art. III, §31 ..... 3a

Miss. Const. art. VI, §150 ..... 3a

Miss. Const. art. VI, §165 ..... 3a

Miss. Const. art. VI, §175 ..... 3a

STATUTES:

Miss. Code Ann. §9-3-9 (1972, Supp.) 4a

Miss. Code Ann. §9-3-27 (1972) 4a

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT 5

Criminal actions—Provisions concerning—Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 7

Trial by jury in civil cases.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MISSISSIPPI CONSTITUTION

ARTICLE 3

BILL OF RIGHTS

Section 31. The right of trial by jury shall remain inviolate, but the legislature may, by enactment, provide that in all civil suits tried in the circuit and chancery court, nine or more jurors may agree on the verdict and return it as the verdict of the jury.

ARTICLE 6

JUDICIARY

Section 150. No person shall be eligible to the office of judge of the Supreme Court who shall not have attained the age of thirty years at the time of his appointment, and who shall not have been a practicing attorney and a citizen of the state for five years immediately preceding such appointment.

Section 165. No judge of any court shall preside on the trial of any cause, where the parties or either of them, shall be connected with him by affinity or consanguinity, or where he may be interested in the same, except by the consent of the judge and of the parties. Whenever any judge of the Supreme Court or the judge or chancellor of any district in this state shall, for any reason, be unable or disqualified to preside at any term of court, or in any case where the attorneys engaged therein shall not agree upon a member of the bar to preside in his place, the governor may commission another, or others, of law knowledge, to preside at such term or during such disability or disqualification in the place of the judge or judges so disqualified.

Section 175. All public officers, for wilful neglect of duty or misdemeanor in office, shall be liable to presentment or indictment by a grand jury; and, upon conviction, shall be removed from office, and otherwise punished as may be prescribed by law.

MISSISSIPPI CODE

CHAPTER 3

Supreme Court

§ 9-3-9. Jurisdiction of the court.

The supreme court shall have such jurisdiction as properly belongs to a court of appeals, and shall hear and determine all manner of pleas, plaints, motions, causes, and controversies, civil and criminal, which are now pending therein, or which may be brought before it, and which shall be cognizable in said court; but a cause shall not be removed into said court until after final judgment in the court below, except in cases particularly provided for by law; and the supreme court may grant new trials and correct errors of the circuit court in granting or refusing the same.

Provided, however, the supreme court shall have such original and appellate jurisdiction as may be otherwise provided by law in cases and proceedings for modification of any rates charged or sought to be charged to the public by any public utility.

§ 9-3-27. Supreme court judges may employ secretaries and research assistants for the court.

The judges of the supreme court are authorized and empowered to employ such number of secretaries and research assistants to said court as the court may deem necessary for its efficient operation, provided, that each of said research assistants herein authorized shall be qualified members of the Mississippi State Bar, or qualified for admission thereto under the laws of this state. They shall each receive a salary to be fixed by the judges of the supreme court, through an order entered on the minutes of said court, within the appropriation for the payment of such salaries in the supreme court. Said secretaries and research assistants, upon entering into the discharge of their duties, shall take an oath to be administered by one of the judges of said court that they will faithfully discharge the duties of said office and that they will not disclose the secrets or deliberations of the

court, and they shall be removed at the pleasure of the court. Said secretaries and assistants shall be paid on a certificate by the chief justice or by a justice appointed by him to so act to the auditor of public accounts, who shall issue his warrant for the amount or amounts so certified to the state treasurer.

APPENDIX

No. ____

In The

Supreme Court Of The United States

October Term, 1988

HENRY EDWARD BRISTOW,

Petitioner,

v.

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE,

Respondents.

Appendix To Petition For A Writ Of Certiorari To The Supreme Court of Mississippi

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APPENDIX A

LIFE & CASUALTY INS. CO. OF TENNESSEE

v.

Henry Edward BRISTOW.

No. 57393.

Supreme Court of Mississippi.

July 20, 1988.

Rehearing Denied Aug. 10, 1988.

Insured brought action against insurer alleging bad-faith failure to pay under disability policy. The Circuit Court, Lee County, Frank A. Russell, J., awarded actual and punitive damages. The insurer appealed. The Supreme Court, Anderson, J., held that: (1) the issue of punitive damages should not have been submitted to jury, and (2) the award of damages for emotional suffering was not supported by substantial evidence.

Reversed and rendered.

1. Insurance § 563

An insurance company has a duty to promptly and fully investigate any claim, and in the case of medical or disability insurance, this involves the obtaining of all available medical information relevant to the claim.

2. Insurance § 602.2(4)

An insurance company is entitled to rely upon information from the insured's doctor in making its decision about benefits.

3. Insurance § 602.2(4)

Insurer had arguable reason for denying continued disability benefits, where insurer relied on insured's physician's

statement indicating insured was not disabled from all gain occupations, and, in any event, did not act with malice, gross negligence, or wanton disregard of rights of insured, so that there was no basis for award of punitive damages.

4. Insurance § 602.12(2)

Fact that insurer lacked arguable reason for denying claim did not automatically lead to conclusion that issue of punitive damages should be submitted to the jury; rather, in the absence of arguable reason for denying claim, insured must still make a showing of malice, gross negligence, or wanton disregard of the rights of the insured by the insurer.

5. Insurance § 602.10(1)

Award of $50,000 in compensatory damages to insured for intentional infliction of emotional distress resulting from insurer's bad-faith denial of claim was not supported by substantial evidence, despite evidence insured was depressed and worried about finances, where there was no evidence of intent on the part of the insurer to deliberately make insured miserable, and no evidence of extent to which cutting off benefits contributed to financial worries.

John E. Hughes, III, Wells, Wells, Marble & Hurst, Jackson, William M. Beasley, Mitchell, Voge, Beasley & Corban, Tupelo, for appellant.

John Leroy Long, Roy O. Parker, Tupelo, for appellee.

En Banc.

ANDERSON, Justice, for the Court:

This is an appeal from a jury verdict in the Circuit Court of Lee County in which Henry Edward Bristow was awarded $50,000 in compensatory damages and $6,000,000 in punitive damages for his bad faith claim against Life & Casualty.

In April 1969 the Life & Casualty Insurance Company of

Tennessee issued a disability policy to Henry Edward Bristow, an electrician. The part of the policy in controversy here contains the following statement:

> Total disability means the complete inability of the insured to perform the duties of his regular occupation, except if indemnities have been paid for 24 months of a continuous disability, then . . . "total disability" shall mean the complete inability of the insured to perform the duties of any occupation for which he is reasonably fitted by his education, training and experience. . . .

On February 11, 1980, Bristow was involved in an accident and broke his left arm. His doctors in Tupelo referred him to Dr. Alan Freeland, an orthopedic specialist at the University Medical Center in Jackson. Although he is right handed, Bristow filed a claim under the disability policy. Life & Casualty determined that Bristow was totally disabled for purposes of his regular occupation, and began issuing benefit checks to him from April 18, 1980. For the next year, Bristow continued to visit Dr. Freeland. By July 30, 1981, the doctor was so pleased with Bristow's progress that he released him from treatment for a period of one year with the understanding that if any problems developed, Bristow would contact him. It is undisputed that Bristow did not make any such complaints. At this time Dr. Freeland stated that Bristow should not resume his regular job as a commercial electrician and that he should not do any work involving standing on a ladder or working with objects overhead.

Meanwhile, Life & Casualty continued to receive periodic reports from Dr. Freeland on the status of Bristow's injury. The 24th payment to Bristow was made in January 1982. By the terms of the policy, further payments were permissible only if the insured was completely unable to perform the duties of any occupation for which he was reasonably fitted. Accordingly, Life & Casualty undertook to review Bristow's file as the deadline approached. Life & Casualty wrote a letter to Dr. Freeland on February 16, 1982, requesting a specific statement as to Bristow's status. Dr. Freeland returned the form, indicating thereon that Bristow was still totally disabled as to his regular occupation, but stating that

he was not disabled from other occupations, provided they did not involve heavy manual work, working on ladders, or with overhead objects. After reviewing Bristow's entire file, including this most recent statement by Dr. Freeland, Life & Casualty decided to discontinue the disability benefits and so informed Bristow by letter. Bristow, feeling aggrieved by the decision, consulted a lawyer, who challenged the company's decision. Correspondence in this dispute continued for several months.

In January, 1983, Life & Casualty filed for a declaratory judgment in the Circuit Court of Lee County to determine its obligations under the insurance policy and resolve the dispute. Shortly thereafter in March, Life & Casualty paid Bristow the amount of the disputed benefits and filed an amended complaint asking for declaratory judgment and reimbursement of this amount. Bristow answered with general denials and a counter-claim charging Life & Casualty with bad-faith refusal to pay benefits under the policy. He sought $50,000 in damages for emotional distress and $10,000,000 in punitive damages. The case went to trial in the Circuit Court of Lee County, with all issues being submitted to the jury, including punitive damages. The jury returned a verdict in the amount of $50,000 actual damages and $6,000,000 punitive damages. Life & Casualty feeling aggrieved by this judgment has appealed to this Court.

LAW

ASSIGNMENT OF ERROR NO. I: THE ISSUE OF PUNITIVE DAMAGES SHOULD NOT HAVE BEEN SUBMITTED TO THE JURY.

Mississippi law does not favor punitive damages; they are considered an extraordinary remedy and are allowed "with caution and within narrow limits." *Standard Life Ins. Co. v. Veal,* 354 So.2d 239, 247 (Miss. 1978). In the specific context of insurance litigation, this Court has held that "any plaintiff asking for punitive damages or any special or extraordinary damages based on bad faith of an insurance company has a

heavy burden." *Blue Cross/Blue Shield of Mississippi v. Campbell,* 466 So.2d 833, 842 (Miss. 1984).

Whether or not the question of punitive damages goes to the jury is decided by applying a two-step test: (1) there must be a finding that the insurance company had no "legitimate or arguable reason to deny payment of the claim." *Reserve Life Ins. Co. v. McGee,* 444 So.2d 803, 809 (Miss. 1983); *Campbell, supra*, 466 So.2d at 842.

A finding that there was no arguable reason for denying the claim does not automatically produce the conclusion that punitive damages issue should be submitted to the jury. As this Court recently noted,

> In the absence of an arguable reason, the trial court still must determine whether there is a jury issue as to the insurer's having committed a wilful or malicious wrong, or acted with gross and reckless disregard for the insured's rights. If not, the question of punitive damages should not go to the jury. *Pioneer Life Ins. Co. of Illinois v. Moss,* 513 So.2d 927, 930 (Miss. 1987).

See also, *State Farm Fire & Casualty Co. v. Simpson,* 477 So.2d 242, 250 (Miss. 1985). The wrong complained of must not be an "ordinary tort" such as could be "the produce of forgetfulness, oversight or the like," but must be more in the nature of "heightened" tort evincing "gross, callous or wanton conduct, or . . . accompanied by fraud and deceit." *Simpson,* 477 So.2d at 250.

Note that both of these questions are questions of law, to be decided by the trial judge. *Pioneer Life,* 513 So.2d at 930; *Reserve Life*, 444 So.2d at 809.

Life & Casualty argues that because it relied on the assisting physician's statement (APS) submitted by Dr. Freeland on February 28, it had an "arguable reason" for denying benefits under the disability policy and thus was insulated from punitive damages as a matter of law. Bristow counters that the final APS submitted by Dr. Freeland did not give Life & Casualty an arguable reason for discontinuing benefits. Bristow points to three other APS's mailed to Life & Casualty over the preceding year, the last dated February 3, 1982, shortly before Life & Casualty decided to

review the policy. Bristow further argues that the final APS was mailed directly to Dr. Freeland, instead of through Bristow, as before and that it was "deceitful."

The APS employed by Life & Casualty in this matter is a standard form consisting mainly of boxes to be checked by the physician as appropriate. Item 6a on the form is the question "is patient now totally disabled?" To the side are two sets of yes and no check boxes, one under the words "for any occupation," the other under the words "for his regular occupation." The final APS submitted by Dr. Freeland on February 28 showed that Dr. Freeland checked "yes" indicating Bristow was disabled for his regular occupation, but Dr. Freeland checked the box "no" that he was not disabled for any occupation. The final APS has a typewritten addendum asking specific questions and requiring a written response from the doctor. Number 3 under this "remarks" section has "is he disabled from all gainful occupations?" Dr. Freeland answered "no."

Margaret Lyons, who was head of the individual health claim department of Life & Casualty at the time, testified at trial that she received a memorandum on March 9, 1982, from one of her subordinates inquiring whether disability benefits to Bristow should be discontinued. Mrs. Lyons reviewed Bristow's file with her superior, William Young, the associate manager and second vice-president. On March 16, Mrs. Lyons returned the memorandum to her subordinate with the handwritten notice: "Discontinue any occup. based on dr's report per Mr. Y. (i.e., Young)." Both Young and Mrs. Lyons testified at trial that the "doctor's report" referred to here was the APS of February 28, wherein Dr. Freeland attested that Bristow was not totally disabled for any employment.

Bristow argues that the difference between the three previous APS's submitted by Dr. Freeland and that submitted on February 28 constituted a "discrepancy" which imposed upon Life & Casualty the duty of investigation before discontinuing the claim. He further objects that the typewritten addendum on the APS mailed to Dr. Freeland was "deceptive" in that it referred to "gainful" employment.

[1, 2] Mississippi law does indeed impose a duty upon the insurance company to promptly and fully investigate any claim. In the case of medical or disability insurance, this involves "the obtaining of all available medical information relevant to [the] claim." *Bankers Life & Casualty Co. v. Crenshaw,* 483 So.2d 254, 272 (Miss. 1985). In *Bankers Life*, an insurance company was held liable for failing to meet this standard. However, *Bankers Life* involved a set of facts far more egregious than the ones present here. The Court found that *Bankers Life* had systematically disregarded its own prescribed claims investigation procedures in Crenshaw's case. *Bankers Life* also involved a doctor, who was in the employ of the insurance company, who systematically ignored evidence that pointed to a conclusion other than the one he wished. In the present case, Life & Casualty sought and received information from the insured's own physician. Moreover, there was undisputed testimony that during the period after the injury Life & Casualty had continually sought interviews with Dr. Freeland, without success, and that Bristow had not contacted Dr. Freeland with any additional complaint within the period. It is well settled that an insurance company is entitled to rely upon information from the insured's doctor in making its decision about benefits. E.g., *Blue Cross v. Campbell, supra,* 466 So.2d at 840; *see also O'Connor v. Equitable Life Assurance Society,* 592 F.Supp. 595, 597 (N.D.Miss. 1983). As to the alleged "deceitful" wording of the APS mailed to Dr. Freeland by Life & Casualty, even if it were true as Bristow's brief asserts, that any gainful occupation would be understood to mean "any occupation for which some compensation could be paid," [which is far from apparent] the fact remains that the APS contained the same check boxes as its predecessors, and Dr. Freeland marked "no" under the question of whether Bristow was disabled for any occupation. As to the fact that Life & Casualty sent this APS directly to Dr. Freeland instead of through Bristow, we are not satisfied that it has any significance.

Life & Casualty cites the *Simpson* case for the proposition that punitive damage instructions should not be submitted to

the jury where the plaintiff's peremptory instruction had been refused, since the refusal would indicate the factual issues to be resolved by the jury. There the Court said:

> A great majority of punitive damage cases should be ended by the trial court's refusal of a peremptory instruction for the plaintiff. That is to say if the plaintiff is not entitled to a peremptory instruction, it logically follows that a punitive damage instruction should be refused. The refusal of the peremptory instruction indicates there are factual issues to be resolved by a jury and because of this it follows that the alleged tortfeasor has logical reason for denying the claim, thereby prohibiting the granting of a punitive damage instruction.

Simpson, 477 So.2d at 254.

This is not really apposite since in the case at bar, Bristow did not ask for a peremptory instruction. However, he did move for a directed verdict at the close of the evidence, and this Court has applied the same rule in that situation for the same reasons. "In the great majority of cases," this Court has held "where the insured is not entitled to a directed verdict on his underlying claim, it follows that the bad faith punitive damage issues should not be submitted to the jury." *Southern United Life Ins. Co. v. Caves,* 481 So.2d 764, 769 (Miss. 1985); *see also Campbell, supra,* 466 So.2d at 843.

[3, 4] We are satisfied that Life & Casualty had an arguable reason for denying disability benefits to Bristow under the policy. Even if it had not, Bristow must clear the second part of the two-part test — he must make a showing of malice, gross negligence, or wanton disregard of the rights of the insured. There is absolutely nothing in this record upon which a finding could be based. This was simply not a case for punitive damages.

WAS THE AWARD OF DAMAGES FOR EMOTIONAL SUFFERING AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE?

The jury's verdict of $50,000 in compensatory damages was based on a finding that Life & Casualty conduct inflicted emotional distress on Bristow.

[5] The evidence concerning emotional distress was not voluminous. Bristow's wife, Frances, testified that after the benefits were cut off, her husband became depressed, was unable to rest and was moody and worried. Randal Thomas, a psychologist who saw Bristow for vocational rehabilitation assessment, said that Bristow was depressed and anxious to a degree that, if it were any worse, would require medical treatment. Bristow told him he was worried about finances; he had a mortgage payment due.

In Mississippi damages for mental anguish and emotional upset cannot be considered in absence of finding "an independent intentional tort separate from the breach of contract." *Blue Cross & Blue Shield of Mississippi, Inc. v. Maas,* 516 So.2d 495, 498 (Miss. 1987); *Aetna Casualty & Surety Co. v. Day,* 487 So.2d 830, 835 (Miss. 1986); *Simpson, supra,* 477 So.2d at 250.

In the present case, neither the pleadings nor the proof support such a finding against Life & Casualty. The counterclaim mentions both fraud and intent to inflict emotional distress. However, common law fraud is not properly pleaded here since there was no allegation that Bristow relied on any representation of Life & Casualty in any pertinent manner. As to intentional infliction of emotional distress, neither of the two witnesses who spoke to this matter made even an unsupported assertion that Life & Casualty *intended* for Bristow to be made miserable. The testimony of Dr. Thomas does not even speak to the issue of causality at all. Dr. Thomas testified only that Bristow was depressed when he examined him. He also gave the opinion that this distress was also caused by his financial worry. He did not, however, venture any opinion as to the degree to which the benefits cut off contributed to those financial worries. In fact, it is

clear from this record that Dr. Thomas never even had seen Bristow before the examination, let alone before the accident. For all he knew, Bristow might have been habitually depressed.

In short, there was no substantial evidence to support the award of damages for mental distress.

Because our conclusion on liability and punitive damages is dispositive, it is not necessary to address the other assignments of error. There being nothing in the record to support either actual or punitive damages, the plaintiff must take nothing. The verdict of the jury must be reversed and judgment rendered for Life & Casualty.

REVERSED AND RENDERED.

ROY NOBLE LEE, C.J., HAWKINS and DAN M. LEE, P.JJ., and PRATHER, ROBERTSON, SULLIVAN and GRIFFIN, JJ., concur.

ZUCCARO, J., not participating.

APPENDIX B

IN THE
SUPREME COURT OF THE STATE OF MISSISSIPPI

LIFE & CASUALTY INSURANCE COMPANY
OF TENNESSEE *Appellant*

VS. NO. 57,393

HENRY EDWARD BRISTOW *Appellee*

PETITION FOR REHEARING

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Laywers Medical Cyclopedia
Allen Smith Co., Indianapolis, Indiana,
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IN THE
SUPREME COURT OF THE STATE OF MISSISSIPPI

LIFE & CASUALTY INSURANCE COMPANY
OF TENNESSEE *Appellant*

VS. NO. 57, 393

HENRY EDWARD BRISTOW *Appellee*

PETITION FOR REHEARING

If the student didn't learn, then the teacher didn't teach! We make this analogy realizing that we have somehow failed to demonstrate to you the contrived specious defense on the part of Life & Casualty Insurance Company of Tennessee.

Life & Casualty Insurance Company's conduct is so subtle that you really have to think about it. Yes, take it slowly and really think about it.

If we had one wish, it would be for each of you to read the entire record — not the abstract which is always slanted; not just the briefs, but we request that each Justice read the entire record.

We argued this case January 28, 1988 and the Court didn't announce the decision until July 20, 1988. We know that you would like to have the time to read the record in each case but sometimes you cannot. A decision has to be made and it is easy to let your decision stand, but the easy thing to do is not necessarily the right thing to do. *Please* read the record.

I.
STANDARD OF REVIEW

A. General Standard

Quoting Justice Robertson from *City of Jackson v. Locklar*, 431 So.2d 475, 478-479 (Miss. 1983), the standard of review is as follows:

> Our institutional role mandates substantial deference to the jury's findings of fact and to the trial judge's determination whether a jury issue was tendered. When a verdict is challenged via appeal from denial of a motion for j.n.o.v., we have before us the same record the trial judge had. We see the testimony the trial judge heard. We do not, however, observe the manner and demeanor of the witnesses. We do not smell the smoke of the battle. cf. *Gulbreath v. Johnson,* 427 So.2d 705, 709 (Miss. 1983). The trial judge's determination whether, under the standards articulated above, a jury issue has been presented, must per force be given great respect here.

B. Punitive Damage Standard

The standard of review is found in *Life Ins. Co. of Mississippi v. Aller*, 518 So. 2d 1189, 11983 (Miss. 1987):

> . . . under the totality of the circumstances and viewing the insurer's conduct in the aggregate, a reasonable hypothetical trier of fact could have found that either malice or gross neglect/reckless disregard had been established. *See Scott v. Transport Indemnity Co.,* 513 So.2d at 897; *Mississippi Farm Bureau Insurance Co. v. Todd,* 492 So.2d 919, 933 (Miss. 1986); *see generally Stubblefield v. Jesco, Inc.,* 464 So.2d 47, 54 (Miss. 1984); *Paymaster Oil Mill Co. v. Mitchell,* 301 So.2d 652, 657 (Miss. 1975).

II.
THE TOTALITY OF THE CIRCUMSTANCES

A more adequate and thorough statement of the facts in this case is necessary for a proper understanding of what happened:

Henry Ed Bristow is a resident of Saltillo, Mississippi, and except for the time he was in the military, has spent most of his life in Lee County. At an early point in his life, Bristow was profoundly influenced by the fact that his father abandoned his family, leaving mother and children in a state of severe poverty. As Mr. Bristow attained adulthood and became a family man, he was determined that his family would never have to endure the deprivations he had en-

dured during his youth. That was the primary motivating factor which caused him to purchase Disability Insurance Policy No. 9310750 from Life and Casualty. Mr. Bristow purchased this coverage in order to protect his income, so that he could take care of his family in the event he ever became disabled to work.

In 1970, Mr. Bristow drew some disability benefits from the policy due to lumbar disc surgery from an automobile accident. Mr. Young, the same Mr. Young who made the decision to terminate Ed Bristow's benefits in this case, wrote Dr. Robison for a medical report claiming there was a discrepancy that must be cleared up. (R. 327, 330, also see claims file) Here, Life and Casualty made a proper investigation after learning of a discrepancy. However, in 1982, contrary to the Court's opinion Life and Casualty disregarded its claims procedures by failing to check out the discrepancies in the APS forms and failing to send the warning letter contained in the claims procedure manual before terminating benefits. (R. 317, 318, 328)

Mr. Bristow paid premiums on the policy from 1969 to February 1980, when he fell, at work, from a scissor type scaffold onto a concrete floor. He suffered a compound comminuted fracture of the left arm. This was not a simple broken arm. The bones went completely through his insulated overalls and he had a hand full of bones. (R. 584) This Court appears to have taken very lightly the type injury that Mr. Bristow received. When the Court stated in the opinion that Bristow broke his left arm and although he is right handed, Bristow filed a claim under the disability policy, is the Court stating that Bristow is a malingerer or that he was not hurt badly?

For a short dissertation on comminuted compound fractures we are enclosing excerpts from *Lawyers Medical Cyclopedia*, published by the Allen Smith Company of Indianapolis, Indiana. The Co-Editors of this Cyclopedia are Charles J. Frankel, M.D., L.L.B., J. W. Holloway, Jr. L.L.B., Paul E. McMaster, M.D. and Kenneth Redden, L.L.B., Volume I, page 214 and Volume II, page 229, 230, 231, 232 and 233.[1]

[1]See Exhibit "k".

Initially, Mr. Bristow was treated by Dr. Mitchell Massey, Dr. Ben Buchanan and Dr. Earl Whitwell, of Tupelo, Mississippi. In May 1980, when Mr. Bristow's fracture failed to heal, he was referred to Dr. Alan Freeland, at the University Medical Center, in Jackson, Mississippi.

Life and Casualty paid disability benefits from February of 1980 to February of 1982.

In September 1980, Dr. Freeland wrote a letter to Lynel Massie, of the Social Security Administration, for the purpose of advising Social Security of Mr. Bristow's prognosis. A copy of this letter appears as Exhibit "A" at the end of this petition. (R. 745) Note that in this letter Dr. Freeland indicates that he believes Bristow will have to be referred to vocational rehabilitation, for retraining before he can resume employment. Life and Casualty admitted in request For Admissions number 56 (R. 745) that William Young knew that the policy definition of total disability did not contemplate or require that the insured be retrained or rehabilitated in order to continue benefits. Therefore, Life and Casualty knew that Mr. Bristow was totally disabled unless he was retrained. Life and Casualty had a copy of this letter in their claim file prior to terminating Mr. Bristow's benefits. Request For Admission number 27. (R. 745).

In May 1981, Dr. Freeland operated on Mr. Bristow and in July 1981, Dr. Freeland examined Mr. Bristow and advised him that he would not have to return to see Dr. Freeland for one year. At this time Life and Casualty's claim department set in motion the final stage of a scheme which was intended to manufacture an arguable reason for terminating Bristow's benefits.

The scheme used by Life and Casualty in this case is a subtle, hard-to-detect device; but it is real and devious, and is a technique which is not original with Life and Casualty. (See *Moore v. American United Life Ins. Co.,* 197 Cal.Rptr. 878 (Cal. 1984).

To detect this subtle scheme, one must understand the interplay of language contained in Policy No. 9310750's definition of total disability, and the language of Life and Casualty's Attending Physician's Statement, wherein the at-

tending physician is asked to evaluate whether the claimant is totally disabled from "any occupation" or from his "regular occupation".

The definition of total disability set out in Policy No. 9310750 is as follows:

> Whenever used in this policy: 'total disability' means the complete inability of the insured to perform the duties of his regular occupation, except that if indemnities have been paid for 24 months of any continuous disability, then for the balance of the period of disability after the said period of 24 months 'total disability' shall be the complete inability of the insured to perform the duties of any occupation for which he is reasonably fitted by education, training and experience.

Note that *this disability definition does not* say "any occupation for which he may become fitted"; *nor does it say* "any occupation for which he may be retrained". In other words, *under this disability definition, the insured may be considered disabled even though there may be some jobs for which he could be retrained.* (R. 745-756)

The Attending Physician's Statement used by Life and Casualty to obtain medical information from the insured's physician states, at question 6 (a) as follows:

> 6. (a) Is patient now totally disabled?
> FOR ANY OCCUPATION
> Yes ___ No ___
> FOR HIS REGULAR OCCUPATION
> Yes ___ No ___

Keep in mind that question 6 (a) refers only to "any occupation" (which can be interpreted to mean any occupation under the sun, i.e., selling pencils on a street corner) and does not contain *any reference to the actual policy definition of total disability,* (i.e., any occupation for which he is *reasonably fitted* by education, training and experience).

On August 6, 1981, Life and Casualty obtained from Dr. Freeland's office an Attending Physician's Statement which is attached to this petition as Exhibit "B". On this APS form, please note that the response to question 4 (c) concerning

frequency of visits, states " . . . *yearly*"; which told Life and Casualty that Bristow would not be returning to see Dr. Freeland for a year, and also told them that no new medical information concerning Bristow could be obtained from Freeland for at least a year.

Note that question 6 (a) created some confusion for the person who filled out the form because the "No" box was first checked for "any occupation", then was crossed out and "Yes" was checked.

Note that question 6 (d), concerning whether Bristow was a suitable candidate for a rehabilitation program was checked "Yes".

Note that the signature line of the APS indicates that the *form was not filled out by Dr. Freeland,* but was completed by a *secretary:*

Alan E. Freeland/lb.

Sue Spencer, Dr. Freeland's senior secretary, stated in her deposition that *this form was completed by Linda Brister.* (Spencer deposition p. 20) (R. 363)

Although Life and Casualty knew that Bristow would not be returning to see Dr. Freeland for a year, *they hired Equifax* in Jackson, Mississippi to obtain a Confirmation Of Interview from Dr. Freeland on November 21, 1981. This document was not completed by Dr. Freeland, but was completed by Sue Spencer (Spencer deposition p. 42). (R. 385) This document is attached hereto as Exhibit "C". (R. 386) Equifax was never again employed to investigate this claim.

Although Life and Casualty knew Bristow would not be returning to Dr. Freeland for a year, and although *they knew* they would not be obtaining any new medical information, *they obtained another APS* from Dr. Freeland on *December 30, 1981.* This document is Exhibit "D". (R. 200, Exhibit "3") Note that the December 30, 1981, APS contains no medical information that was not contained in the August 1981 APS or the November 1981 Equifax Confirmation Of Interview. Note that the response to 6 (c) concerning *expected date of return to work was answered "undetermined".* Note that, *again,* the signature lines shows that the APS was completed, not by Dr. Freeland, but by a secretary. (Spencer deposition p. 20). (R. 363)

On February 3, 1982, Life and Casualty obtained *yet another* APS from Dr. Freeland's office. This is Exhibit "E" to this petition. *This form contains no new medical information.* (Bristow *still* was not scheduled to return to Dr. Freeland until *July 1982*). This form was completed exactly as the December 30, 1981, APS had been completed, and it was completed by Dr. Freeland's secretary.

Up to this time, all the APS forms were being completed by Dr. Freeland's secretaries whose offices are in the clinic portion of the University Medical Center. *Life and Casualty was having no luck getting the fish to bite. They tried their luck in another stream.* Sue Spencer is Dr. Freeland's senior secretary, and she has an office in a different building than those secretaries who had been filling out the previous APS forms. (In February 1982, Ms. Spencer had never met or seen Mr. Bristow, a fact known to Life and Casualty, because she was interviewed by Equifax.) Although Life and Casualty received the February 3, 1982, APS on *February 9, 1982,* Elaine Locke of the claims department *mailed a fourth* APS to Dr. Freeland's office on *February 15, 1982* (only six days after receiving the last one). It was completed by Sue Spencer on February 25, 1982, and returned to Life and Casualty. (Spencer deposition p. 8). (R. 351) This APS is Exhibit "F" to this petition. (R. 388, 389)

It is important to note that the "Remarks" on the second page of the February 25, 1982 APS contained some typewritten questions that apparently were inserted by someone in the claims department at Life and Casualty. *These questions had never been included on previous APS forms,* but were substantially the same questions asked by Equifax in their November interview. Especially suspicious is question number 3:

IS HE DISABLED FROM ALL GAINFUL OCCUPATIONS?

Note that question number 3 is a more narrow and stringent definition of "total disability" than the actual policy definition of Policy No. 9310750. This typewritten question was included on the form to suggest to the person completing the form,

that question 6 (a) on the front of the form "for any occupation" should be checked "No". In fact, Sue Spencer took literally the inquiries of the February 25, 1982, APS. She interpreted 6 (a) and question number 3 of the "Remarks" section as asking whether there was something, somewhere that Mr. Bristow could do, (Spencer deposition p. 28) (R. 371) and she checked the "For Any Occupation" box "No". *Sue Spencer did not realize that Life and Casualty would rely on this APS to terminate Bristow's benefits.* (Spencer deposition p. 12). (R. 355). Note that question 6 (b) states, "If no, when was patient able to go to work?" Although 6 (a) was answered, "No", 6 (b) was not answered.

Exhibit "G" is an internal memo from the claim files of Life and Casualty. (R. 200, Exhibit "3") It appears from this memo that the *primary factor upon which Life and Casualty relied for termination of benefits, was the "No" box at question 6 (a) of the February 25, 1982 APS,* while ignoring question 6 (b).

At no time prior to February 1982, was Dr. Freeland or any of his office personnel provided with the actual policy definition of total disability which appeared in Policy No. 9310750. (R. 251)

Exhibit "H" is a copy of the March 18, 1982 termination letter sent by Life and Casualty to Mr. Bristow. (R. 200, Exhibit "3") Note that the letter itself is contradictory in its terms of disability, and is misleading.

Exhibit "I" is a copy of a letter from Elaine Locke, dated June 29, 1982, which emphasizes the terms "any occupation" and *the February 25, 1982, APS was the basis for the termination of Bristow's benefits.* (R. 200, Exhibit "3")

William Young, the senior claims person who made the ultimate decision to cut off Bristow's benefits, stated in his deposition that in March 1982, *he did not know Bristow's level of formal education.* (R. 324) Young stated that *he never consulted* the Department of Labor Dictionary of Occupational Titles to determine whether there were jobs whose physical requirements could be performed by Bristow. (R. 744-745) In March 1982, *Life and Casualty did not have anyone in their claims department who had vocational training, or who was a vocational specialist.* (R. 744)

In summary, the totality of the circumstances demonstrate that Life and Casualty knew that Mr. Bristow last saw Dr. Freeland on July 30, 1981. They also knew that he was not scheduled to be seen by Dr. Freeland until July 30, 1982. Nevertheless, they continued to send forms to Dr. Freeland in the attempt to obtain an arguable reason to deny Mr. Bristow's coverage. Additionally, they hired Equifax to make a Confirmation of Interview. Three of the APS's and the Confirmation of Interview did not offer a reason to deny Mr. Bristow benefits. The only evidence tending to offer any credence to terminating Mr. Bristow's benefits was on the fourth APS in which Block 6 (a) was checked no, "For any occupation". However, in that same APS, Block 6 (b) was left incomplete, although it was required to be completed if Block 6 (a) was checked no. That established a discrepancy on the face of this form itself. Additionally, it was in conflict with the other three previous forms and the Equifax investigation. Life and Casualty knew all of this was in conflict, because they knew Mr. Bristow had not been to see Dr. Freeland in the intervening time in which all of these reports were obtained.

Notwithstanding the admission that Life and Casualty knew Mr. Bristow did not have to be retrained to qualify for benefits, nevertheless they denied his benefits at a time when they knew he had not been released from the doctor, and they had not contacted any vocational specialist to determine whether or not it was even possible for him to be retrained in another occupation.

III.
WAS THE AWARD OF DAMAGE FOR EMOTIONAL SUFFERING AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE?

On page 9 of the slip opinion in the case at bar the Court said, "Neither the pleadings or the proof support the finding of an independent intentional tort separate from the breach of contract." The Court apparently ignored Rule 15 (b) of the Mississippi Rules of Civil Procedure, which pertinent part is as follows:

> When issues not raised by the pleadings are tried by expressed or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial on these issues.

Even if the pleadings did not properly raise the issue, the issue of an independent intentional tort was tried, as demonstrated by the special interrogatory verdict which was prepared by Life and Casualty's attorney. A copy of the special interrogatory verdict is attached as Exhibit "J". Since the issue of an intentional tort separate and apart from the breach of contract was, in fact, tried in this case and the jury resolved the issue against Life and Casualty, under Mississippi Rule of Civil Procedure 15 (b) the pleadings were necessarily amended to conform. Further, since this was an intentional independent tort Bristow can recover for emotional distress. See *Sears, Roebuck & Co. v. Devers,* 405 So.2d 898, 901, 902 (Miss. 1982). As to the causation of emotional stress Frances Bristow, wife of Ed, stated as follows:

> Q. Alright, just one point I want you to tell the jury about is the time they cut Ed off his benefits. How did this affect him, just in general terms as best you can describe it as far as you observed?
>
> A. Well, he became depressed, he didn't rest.
>
> Q. Alright, just what you observed.
>
> A. He didn't rest at night and he couldn't — he was real moody, worried all the time.
>
> Q. Okay, was that more so than any other period of time?
>
> A. Yes.
>
> (R. 617-618)

How many witnesses does it take to prove a point? Only one witness can prove any point if they are believable and *Frances Bristow, whose testimony was undisputed, definitely testified to causation of*

the emotional distress and the jury agreed with her. The trial judge also agreed with her when he refused to grant a new trial. No case has been cited or found to support the proposition that "a person might be habitually depressed." In summary, the only evidence is that Mr. Bristow was depressed and worried all the time as a result of Life and Casualty's actions.

The record contains nothing to the contrary. In short, the proof, is uncontradicted on this point. There was testimony from both Mrs. Bristow and Dr. Randall Thomas[2] that Mr. Bristow suffered emotional stress as a result of Life and Casualty's cutting off his benefits. How many uncontradicted witnesses does it take to constitute substantial evidence?

This Court is obviously substituting its judgment for that of the jury. After reading the opinion, Appellee can only conclude the entire record has not been read or considered by all members of the Court. Heretofore, this Court has given due deference to a jury verdict and due deference to the trial judge who refused to grant a new trial.

IV.
THE ISSUE OF PUNITIVE DAMAGES SHOULD HAVE BEEN SUBMITTED TO THE JURY BECAUSE LIFE AND CASUALTY RELIED ON A CONTRIVED, SPECIOUS AND FABRICATED REASON TO TERMINATE BRISTOW'S BENEFITS

Under Mississippi law, punitive damages can be assessed for breach of contract. The act giving rise to punitive damages must be "a willful and intentional wrong, or . . . such gross negligence and reckless negligence as is equivalent to such a wrong". *Seals v. St. Regis Paper Company,* 236 So.2d

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[2]The history taken by Dr. Randall Thomas revealed Bristow has episodic crying spells, depression and worries regarding finances. He worked while his benefits were stopped when he felt he shouldn't have done it. He was worried about losing his home because of a mortgage payment due. He reported significant mood swings, says he may not go to sleep until two or three A.M. and get up at approximately six A.M. One day per week he would remain in bed all the time. He takes medication to sleep and for the worry. The cause of his depression and emotional distress was financial. (Just as Frances Bristow stated in her testimony.) (R. 647, 648, 649, 650)

388, 392 (Miss. 1970). Punitive damages are also proper when the reason for denying payment is contrary to an expressed term in the insurance policy or if the insurer fails to pay a claim without a legitimate or arguable reason. See *Standard Life Insurance Company of Indiana v. Veal,* 354 So.2d 239 (Miss. 1978). The Supreme Court of Mississippi in *Veal,* expressed the policy behind granting punitive damages in these cases:

> If an insurance company could not be subjected to punitive damages it could intentionally and unreasonably refuse payment of a legitimate claim with veritable impunity. To permit an insurer to deny a legitimate claim, and thus force a claimant to litigate with no fear that claimant's maximum recovery could exceed the policy limits plus interest, would enable the insurer to pressure an insured to a point of desperation enabling the insurer to force an inadequate settlement or avoid payment entirely. *Id.* at 248.

In the case of *Blue Cross/Blue Shield v. Campbell,* 466 So.2d 833 (Miss. 1984) the Mississippi Supreme Court has laid down a general test to be followed by the trial court in determining whether a punitive damage question should be submitted to a jury in insurance cases. The Supreme Court has indicated, that in a majority of cases, unless the Plaintiff is entitled to a directed verdict on the underlying insurance contract question, that it follows that the insurance company had a legitimate or arguable reason for denying the claim, and that, therefore, punitive damages are not in order. However, both Justice Hawkins, writing for the majority, and Justice Robertson, in a concurring opinion, recognize that the above test is not applicable in every case.

See *Blue Cross/Blue Shield v. Campbell,* supra, at 843, where Justice Hawkins stated:

> Yet, the test is not infallible. Under some contrived or specious defense, an insurance carrier may be entitled to have the jury pass upon the issue of liability under the contract, yet not thereby insulate itself against a punitive damage claim based upon bad faith. . .
>
> It was never the intent of the majority of the court in

> *Reserve Life* to remove from the trial judge the responsibility and function of determining from all the evidence whether or not the plaintiff had created a "bad faith" issue.
>
> This court, therefore, is not prepared to state as an absolute that there can be no case of a jury considering that the question of bad faith even though there was no directed verdict on liability under the insurance contract claim, and the jury also has some factual issue to determine on contract liability. *Reserve Life* was such a case in the view of the majority of this court.

See Justice Robertson's concurring opinion in *Blue Cross/Blue Shield v. Campbell,* supra, where he indicated that there is an exception to the test which requires the insured to prevail by directed verdict on the underlying contract question, prior to a punitive damage instruction being submitted to the jury.

The subject case is an example of Justice Hawkins' "contrived or specious defense" exception. This case falls within Justice Robertson's "lying exception". This is definitely a case which should have been submitted to the jury on the issue of punitive damages, because there is substantial and persuasive evidence that Life and Casualty intentionally relied upon a devious, contrived, specious and fabricated scheme to manufacture a reason to terminate Bristow's disability benefits at the 24 month change of disability definition. The jury rejected Life and Casualty's defense to the underlying contract because it is based on deliberate falsehood and fabrication.

Life and Casualty's scheme consisted of obtaining from Dr. Freeland's office, an APS statement which contained an indication that Bristow was not disabled "for any occupation". This was achieved by submitting to Dr. Freeland's office, an APS which contained misleading definition of disability. At no time prior to February 1982, did Life and Casualty provide Dr. Freeland or his office personnel with the true policy definition of disability. Also, Life and Casualty was acting in bad faith by requesting a *vocational* evaluation from a medical doctor. An orthopedic surgeon is qualified to assess and evaluate physical and anatomical impair-

ment of patients; and a treating physician is qualified to restrict his patient from performing certain tasks. But, the question of whether Mr. Bristow was disabled under the actual policy definition requires an evaluation of Bristow's physical and medical condition, as well as his age, education, training, experience, work history, residual functional capacity, intellectual capacity and other vocational factors. Also, in order to make an accurate evaluation of disability, one must have some knowledge of whether jobs exist, whose physical requirements can be performed by the insured.

It was improper for Life and Casualty to seek a vocational evaluation from a medical doctor who was unqualified to make such an evaluation; and it was ultimately improper for Life and Casualty to rely on the February 25, 1982, APS, which was filled out by a secretary, without the direct input of knowledge of Dr. Freeland.

Life and Casualty fabricated a reason to terminate Bristow's benefits by submitting a misleading APS form, to a physician who was ill-informed as to the actual standard of disability to be applied, and who was actually not qualified to make a proper evaluation of the ultimate question of disability.

Life and Casualty was persistent in continuing to submit the APS forms to Dr. Freeland's offices, until Life and Casualty was successful in misleading someone in Dr. Freeland's office (Sue Spencer) into checking the needed "No" box at question 6 (a) of the APS. Life and Casualty made the February 25, 1982, APS form even more misleading by adding the typewritten question number 3, on the "Remarks" portion of the back of the form.

Is he disabled from all gainful occupations:

Once Life and Casualty obtained the necessary check box on the APS form, they had all the information that they needed on which to base the wrongful termination of Mr. Bristow's benefits.

* * *

This subtle and devious scheme was not invented by Life and Casualty. There are other reported cases in the United States where the insurance company was assessed punitive damages for working almost the identical scam. The case of *Moore v. American United Life Insurance Company,* 197 Cal.Rptr. 878 (Cal. 1984) documents how other insurance companies have used almost the same scheme to cheat their customers. Because the *Moore* case is so persuasive, we are attaching a copy of this case to this petition. The following portions of the *Moore* decision explain how the insurance company in that case used the APS forms to manufacture a reason for terminating benefits:

> B. Facts related to defendant's deceptive claims policies and practices.
>
> Relying primarily on testimony of defendant's manager of group claims, Duane Whipple, plaintiff presented evidence that at or about the time plaintiff's claim was reviewed and denied, defendant used the following practices and procedures in its review of disability claims:
>
> 1. As part of his or her initial claims documentation, an insured was required to submit to defendant an Attending Physician Statement, to be completed by a physician who had treated the insured for the claimed disability. The Attending Physician Statement asked the physician to state whether the insured was then "totally disabled" alternatively "for any occupation" or "for his regular occupation." *No definition of "total disability" accompanied the Attending Physician Statement.* (Emphasis ours)
>
> 2. In the event the insured's physician indicated the insured was not totally disabled, the claim would be denied without further investigation.
>
> 3. In the event the insured's physician indicated the insured was not disabled "for any occupation" but was disabled "for his regular occupation" the claim would be denied without further investigation.
>
> 4. Defendant knew that the opinions of attending physicians, as reflected in the Attending Physician

Statements, were unreliable because attending physicians had widely differing views of "total disability".

5. If the insured's physician indicated in the Attending Physician Statement that the insured was totally disabled for both regular occupation and for any occupation, defendant would send the treating physician a letter setting forth the policy definition of "total disability" and asking the physician to reevaluate his or her opinion of "total disability" in light of the definition in the policy, i.e., that a disability must prevent the insured "from engaging in any occupation or employment for compensation, profit, or gain." The physician was not informed that the policy definition misstated California law (see *Erreca v. West. States Life Ins. Co.,* supra) was therefore unlawfully restrictive.

6. In the event the insured's physician responded to the aforementioned letter indicating the insured was not totally disabled according to the policy definition, the claim would be denied without further investigation.

7. When defendant would deny a claim, it would send the insured a letter setting forth the policy's definition of "total disability", although that definition mistated California law.

8. *Defendant did not investigate the work experience, education, or social history of an insured before denying a disability claim.* (Emphasis ours)

9. Even though defendant's manager of group claims knew, prior to denial of plaintiff's claim, that the definition of "total disability" in its policy did not accurately reflect California law, defendant had made no changes in its claims review procedures even as of the time of trial.

The *Moore* case was submitted to the jury on a punitive damage instruction. The jury awarded $30,000.00 actual damages and 2.5 million dollars punitive damages.

Also instructive in the present case is *Henderson v. U.S.F. & G.*, 620 F.2d 530, (5th Cir. 1980), a Mississippi case, wherein the Fifth Circuit held that, in spite of whatever policy defenses the insurance company might rely on, the punitive damage issue should go to the jury because there was

sufficient evidence that the insurance company had hidden a motor vehicle liability policy:

> This reversal is proper even though under Mississippi caselaw, USF&G had an arguable defense to coverage, which ordinarily would be sufficient to immunize its actions for punitive sanctions. If Henderson's position is accepted, USF&G's acts in hiding the policy render ineffectual any other defense it had to the punitive damages claim. If USF&G had delivered the policy and asserted its coverage defenses, Henderson could have successfully brought a separate action to settle the insurance question, as he tried to do. If coverage had been established, as it was in the trial of this case, then serious settlement negotiations could have been undertaken with the administratrix, who was willing to settle within the $50,000 policy's limits. Henderson would not have been liable for $100,000. Should a jury determine that USF&G's refusal to be forthright, until after stalwart efforts by Henderson, blocked this solution their other defenses to the punitive damages claim are rendered invalid.

Life and Casualty did not have any reasonably arguable reasons to terminate Bristow's benefits. This case was submitted to the jury on the punitive damage question because there is substantial and persuasive evidence that Life and Casualty fraudulently fabricated a contrived or specious reason for terminating Bristow's benefits.

The Court held in the case of *Life Ins. Co. of Mississippi v. Allen*, 518 So.2d 1189, 1193 (Miss. 1987) that:

> In deciding whether a punitive damages instruction should be given in a bad faith refusal case, the trial court proceeds as in any other case where objection is made to submission to the jury of an issue of fact. The reviewing court must look at the elements of the punitive damages claim just enumerated and decide whether, under the totality of the circumstances and viewing the insurer's conduct in the aggregate, a reasonable hypothetical trier of fact could have found that either malice or gross neglect/reckless disregard had been established. *See Scott v. Transport Indemnity Co.*, 513 So. 2d at 897; *Mississippi*

Farm Bureau Insurance Co. v. Todd, 492 So. 2d 919, 933 (Miss. 1986); *see generally Stubblefield v. Jesco, Inc.,* 464 So.2d 47, 54 (Miss. 1984); *Paymaster Oil Mill Co. v. Mitchell,* 301 So. 2d 652, 657 (Miss. 1975).

This was a reasonable jury and they, in fact, found that either malice, gross neglect/reckless disregard had been established.

Unless the jury verdict is reinstated, this will be notice to all insurance companies that it is all right to cheat your policyholders as long as you fabricate a contrived or specious reason as a defense. Margaret Lyons stated that this claim was handled in a routine fashion and looking back on the way she handled it, she would today handle the claim in the same way she did back in 1982. (R. 244) If this Court puts the stamp of approval on the way this claim was handled, then Mississippians have no rights against the mighty insurance industry. This will be a mockery of justice and the insurance companies will laugh all the way to the bank.

V.

LIFE AND CASUALTY SHOULD BE SUBJECTED TO PUNITIVE DAMAGES BECAUSE THEY INTENTIONALLY FAILED TO INVESTIGATE BRISTOW'S CASE TO DETERMINE WHETHER HE WAS ACTUALLY DISQUALIFIED UNDER THE DISABILITY POLICY

On September 11, 1985, the Mississippi Supreme Court decided the very important case of *Bankers Life and Cas. Co. v. Crenshaw,* 483 So.2d 254 (Miss. 1985). In that case the Court recognized that an insurance company, that has written a first party insurance contract has a definite duty to *adequately investigate an insurance claim prior to denying that claim. Crenshaw* is closely analogous to the present case, because Life and Casualty made little or no effort to adequately investigate and determine Mr. Bristow's actual disability status as of the time he was terminated from benefits in March 1982.

Bankers Life and Cas. Co. v. Crenshaw establishes in Mississippi a bad faith law that an insurance company has a duty to properly investigate an claim. See *Crenshaw,* at pages 272, 273 and 276 of the opinion.

In the subject case, Life and Casualty was either grossly negligent in failing to investigate Mr. Bristow's case, or they intentionally failed to investigate the case because they were really not interested in determining the facts in the case.

In February and March of 1982, Life and Casualty failed to adequately or accurately determine the true vocational status or disability of Bristow. William Young, the claims person who made the final decision to terminate Bristow's benefits, had no formal or specialized training in vocational evaluation or assessment. (R. 744) Young did not know the actual level of Bristow's formal education. (R. 324)

> Q. Now, I noticed awhile ago when you get ready to make a vocational determination that you didn't say anything about how much education a man has as entering into —
>
> A. I believe I told you I reviewed the file, looked at the medical situation, looked at what the definition of what total disability is, as includes education, training and experience. Yes, we look at all of those.
>
> Q. And at the time you cut him off, you didn't know how much — how far he went in school or even what his present capacity is worth, did you?
>
> A. I do not know how far he went in school.
>
> A. Did you — you didn't know what his present mental capacities were at the time you cut him off, did you?
>
> A. I had received no information that said he didn't have normal mental capacity. Dr. Freeland never reported anything like that.
>
> Q. Is there any place in any of your forms where it says: How much education do you have, Mr. Customer?
>
> A. There isn't.
>
> Q. There is no place that you all find how much education a man has in your forms?
>
> A. No.
>
> Q. And yet in your policy definition, one of the major things that is called for is a man's education, training, and experience, isn't that correct?
>
> A. Yes, sir.

Young stated that he thought Mr. Bristow could be an electrician's supervisor, yet he did not consult with a vocational specialist, or anyone, but made the decision on his own. (R. 326). In determining whether to terminate Mr. Bristow's benefits, Young made no reference to the United States Department of Labor's Dictionary Of Occupational Titles, in an effort to determine whether there were any jobs whose physical requirements could be met by Mr. Bristow. (R. 326)

The policy definition requires that disability be considered in light of the insured's "education, training and experience". Yet, William Young, at the time he terminated Mr. Bristow's benefits, had no knowledge of Bristow's level of formal education, nor did he know what kind of training Mr. Bristow had during his work life. (R. 294)

In considering and investigating Mr. Bristow's case, Life and Casualty *failed to reconcile contradictions* between the February 25, 1982 Attending Physician's Statement and previous APS statements received from August 1981 to February 2, 1982. The February 25, 1982, APS contained the same medical information which was received on each previous APS statement and Confirmation Of Interview Form received by Life and Casualty from August '81 through February 25, 1982. The February 2, 1982, APS advised Life and Casualty that Mr. Bristow was still disabled for any occupation and for his regular occupation. *Life and Casualty failed to determine why* Dr. Freeland's office suddenly (on February 25, 1982) changed their assessment of disability, in spite of the fact that Dr. Freeland had not seen Bristow in over 6 months, and *in spite of the fact that there was no new medical evidence which would indicate that Bristow's condition had changed in any way since August 1981.*

The February 25, 1982, APS was incomplete and contained contradictions on its face. Questions 6 (b) and 6 (c) contained inquiries regarding the date the doctor believed Bristow could return to work. These spaces were simply left blank by Sue Spencer. Also, Sue Spencer's response to 6 (d) indicated that Bristow was a suitable candidate for a rehabilitation program.

It was always Dr. Freeland's opinion that Bristow needed to be vocationally rehabilitated before returning to work. (R. 745)

If Life and Casualty had been interested in adequately investigating this case, they would have recontacted Dr. Freeland's office to determine why Dr. Freeland did not provide Life and Casualty with a determination of the date upon which Mr. Bristow could return to work. Also, Life and Casualty should have checked back with Dr. Freeland's office to determine if the response to question 6 (d) indicated that Dr. Feeeland believed that Mr. Bristow needed to be re-trained prior to returning to work. Life and Casualty failed to reconcile any of these discrepancies. (Spencer deposition p. 12) (R. 357)

The February 25, 1982, APS form was completed by Sue Spencer, Dr. Freeland's senior secretary. (Spencer deposition p. 7) (R. 350) this was known to Life and Casualty because Mrs. Spencer initialed the form by Dr. Freeland's signature. Yet before terminating Bristow's benefits, *Life and Casualty neglected to contact Dr. Freeland's office to determine if the information on the February 25, 1982, APS constituted Dr. Freeland's actual opinion. Life and Casualty did not want to investigate further because they had, with the February 25, 1982, APS, a manufactured or fabricated reason for terminating Bristow's benefits.*

At the time Life and Casualty terminated Bristow's benefits in March 1982, they had had no direct contact with Mr. Bristow since November 21, 1981. Had they contacted Mr. Bristow directly, he would have told them that during the Christmas season of 1981-1982, he began to experience a general physical deterioration, which ultimately proved to be the beginning stages of osteomyelitis. (R. 590, 593)

Had Life and Casualty contacted Mr. Bristow in February of 1982, they would have determined that he was still receiving Social Security disability benefits, and they would have determined that Mr. Bristow was examined by Dr. Houston Franks at the request of the Social Security Administration (R. 591) and that he continued to receive these benefits, and was still receiving them at the time of the trial.

(It is important to remember that at this point in time, Social Security Administration was reviewing recipients and was terminating the benefits of many Social Security recipients.)

All of the above facts indicate that Life and Casualty failed to adequately investigate all the relevant facts surrounding Mr. Bristow's case. This failure to investigate the facts and to reconcile contradictions in the evidence they were aware of, was part and parcel of their scheme to terminate Bristow's benefits. In light of all of the Mississippi cases cited herein, the subject case is clearly one which should have been submitted to the jury on a punitive damage question. There is substantial and persuasive evidence that Life and Casualty terminated Bristow's benefits on the basis of a contrived, specious and fabricated reason. Also, just as in *Crenshaw,* Life and Casualty *intentionally neglected to thoroughly and adequately investigate the case to determine the true facts.* One is reminded of Redd Foxx's statement *"I don't know and I don't want to know".* One phone call to Ed Bristow would have informed it that Ed Bristow was unable to perform the duties of any occupation for which he was reasonably fitted by education, training and experience.

Defendant Bristow called, as an expert witness, Ms. Barbara Paull, an Insurance Claims consultant from Glendale, California. She had fourteen years experience handling claims in the insurance industry and had handled disability claims as an adjuster and in supervisory and managerial positions. She was familiar with policies of this type. (R. 679-682) *Ms. Paull testified that Life and Casualty did not adequately investigate this claim prior to terminating Mr. Bristow's benefits.* She stated that the last APS of February 25, 1982 was inconsistent with the previous APS forms. All of the APS claim forms stated that the last visit Mr. Bristow made to the doctor was July 30, 1981 and all of the forms indicated Mr. Bristow was a suitable candidate for a rehabilitation program, therefore, the information on the APS of February 25, 1982 was *inconsistent and should have been verified prior to making the termination decision.* (R. 707-708) Another inadequacy she noted was that *when the policy definition changes,* it is *imperative* to *know* or *obtain facts regarding a person's past*

education, training and experience. (R. 708). The only information Life and Casualty had was Mr. Bristow's occupation on the application for insurance and the application for disability forms. (R. 734).

She further testified that it was *necessary to investigate further because there were facts favorable to the insured* to *continue his benefits* such as his *age* in terms of work career, *physical limitations* and the fact he was receiving Social Security benefits. (R. 710) The trial judge sustained an objection to the reference of Bristow receiving Social Security benefits but counsel for Life and Casualty brought this out on cross-examination of Ed Bristow. (R. 604-605) The jury was instructed to disregard the statement in regard to Social Security but this Court should consider it because it was in evidence.

Dr. Randall Thomas testified to the following:

> Q. Based on the history he gave you, your examination of him, the tests you performed, the information you have heard in Court, and specifically Dr. Alan Freeland, Dr. James Crowder, Henry Ed. Bristow and his wife Frances Bristow, do you have an opinion, as a vocational expert, as to whether he is — can hold down any occupation for which he is reasonably fitted by virtue of his education, training and experience?
>
> A. Yes, I do.
>
> Q. What is that opinion?
>
> A. In my opinion, he would not be able to hold down jobs such as that.
>
> Q. All right, what is the basis of that opinion?
>
> A. The basis would be the physical restrictions that are defined by the physician. Mr. Bristow's own description of the pain and discomfort, my examination of him and interview with him, his work history. It is not reasonable to think he could go back to do a job that would be comparable to the type of work he was doing, without some type of retraining.

(R. 630)

If Life and Casualty had consulted a qualified vocational rehabilitation expert such as Dr. Thomas, they would not have terminated Ed Bristow's benefits. It was their *duty* to investigate the claim before terminating benefits. Barbara Paull also testified it was Life and Casualty's duty to make a proper investigation.

Today, Ed Bristow is a seriously ill man who has been in the throes of a legal entanglement since March 1982. Only after Life and Casualty learned from Mr. Bristow's attorney that they could be sued for punitive damages, did Life and Casualty institute this declaratory judgment action. Life and Casualty is, nonetheless, guilty of bad faith. Their termination of Mr. Bristow was attended by implied or legal malice, intentional misconduct and outrageous and oppressive bad faith.

Courts make decisions and base their decisions on many things, some of which are for social, economic and political reasons. Sometimes these are good reasons and sometimes they are not.

Punitive damages are the only effective weapon the policy holder has against the mighty Insurance Industry. We must not take this weapon from the people and leave them naked and defenseless.

Justice will be done in this case when, and only when, you reverse your former ruling and reinstate Ed Bristow's judgment against Life & Casualty Insurance Company of Tennessee.

Subtle misbehavior and deceit is the hardest to detect, and it is also the hardest to enforce. First it fools most of the policyholders, and the policyholders often do not seek legal advice; next many lawyers do not recognize it for what it is, and too often the Courts don't recognize it either. When any of the above are fooled an injustice has been done to the insured.

When the totality of the facts and circumstances in this case are considered by rational and fair minded men and women, then the right to trial by jury in this country is preserved. This Court's substitution and interpretation of the facts contrary to the jury in Ed Bristow's case is a violation of all of

his constitution rights dealing with the right to trial by jury including, but not limited to, the Mississippi Constitution, Article III, Section XXXI; and the Fifth, Seventh and Fourteenth Amendments of the Constitution of the United States; and all rights afforded Ed Bristow under the common law of the United States and of the State of Mississippi. Ed Bristow's right to trial by jury is so basic and fundamental that this Court's reversal and rendering in his case was a clear violation of this basic right.

The only appeal we have now is to appeal to your conscience and sense of justice. Justice prevailed in the trial court. Read the record and you will reinstate the jury verdict.

We request, and justice demands, under the United States and Mississippi Constitutions that the verdict in favor of the Ed Bristow in the sum of $6,050,000.00 be reinstated.

Respectfully submitted this the 31st day of July, A.D., 1988.

JOHN LEROY LONG
ATTORNEY AT LAW
311 MAGAZINE STREET
TUPELO, MS 38801
TELEPHONE: (601) 842-2364

BY: /s/ John Leroy Long

JOHN LEROY LONG

AND

ROY O. PARKER AND ASSOCIATES
ATTORNEYS AT LAW
200 NORTH SPRING STREET
POST OFFICE BOX 92
TUPELO, MISSISSIPPI 38802-0092
TELEPHONE: (601) 842-4112

BY: /s/ Roy O. Parker

ROY O. PARKER

Attorneys for Appellee

CERTIFICATE OF SERVICE

This is to certify that I, Roy O. Parker, have this day mailed a true and correct copy of the above and foregoing Petition For Rehearing, to Hon. John E. Hughes, III and Hon. William M. Beasley, Attorneys for Appellant/Plaintiff, by depositing same in the United States Mail, postage prepaid and mailing to them at their usual mailing addresses.

I further certify that I have this day also mailed a true and correct copy of the above and foregoing Petition For Rehearing to Hon. Frank A. Russell, Circuit Judge, by depositing same in the United States Mail, postage prepaid to him at his usual mailing address.

This the 31st day of July, A.D., 1988.

JOHN LEROY LONG
ATTORNEY AT LAW
311 MAGAZINE STREET
TUPELO, MS 38801
TELEPHONE: (601) 842-2364

AND

ROY O. PARKER AND ASSOCIATES
ATTORNEYS AT LAW
200 NORTH SPRING STREET
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TUPELO, MISSISSIPPI 38802-0092
TELEPHONE: (601) 842-4112

BY: /s/ Roy O. Parker

ROY O. PARKER

Attorneys for Appellee

APPENDIX C

IN THE SUPREME COURT OF MISSISSIPPI
DECISIONS HANDED DOWN AUGUST 10, 1988

57,393 Life & Casualty Insurance Company of Tennessee v. Henry Edward Bristow; Circuit, Lee; Petition for Rehearing Denied. Roy Noble Lee, C.J., and Zuccaro, J., Not Participating.

APPENDIX D

IN THE
SUPREME COURT OF THE STATE OF MISSISSIPPI

LIFE & CASUALTY INSURANCE COMPANY
OF TENNESSEE *Appellant*

VS. NO. 57,393

HENRY EDWARD BRISTOW *Appellee*

REQUEST FOR CLARIFICATION OR CORRECTION OF OPINION

I.

Comes now Ed Bristow, and requests the Court for clarification or correction of the opinion in this cause, and as grounds, therefore, would state to the Court as follows:

1. That the Supreme Court of the State of Mississippi has issued an opinion in this case which is diametrically opposed to the findings of fact and the assessment of the credibility of the witnesses in this case when such assessment of fact was made by a fair and rational minded jury composed of a cross section of the community.

2. The opinion in this case is not clear as to the basis of the Court's decision, and on its face appears to be a decision considered by all Justices voting therein after having duly and maturely considered all of the facts and circumstances contained in the record, but Ed Bristow has no way of knowing if his case has been given the expected process of deliberation required by the due process clause of the 14th Amendment to the United States Constitution.

3. Ed Bristow asserts that the procedures and opinion of this Court are in violation of his constitutional rights dealing with the trial by jury as guaranteed by the Mississippi Constitution, Article 3 § 31 and the due process clause of the 14th Amendment to the United States Constitution, the due process clause of the 5th Amendment to the United States

Constitution, and the 7th Amendment to the United States Constitution, and all of the rights afforded Ed Bristow under the common law of the United States and the State of Mississippi.

4. An American citizen's right to a trial by jury is so basic and fundamental that this Court's reversal and rendering of Ed Bristow's jury verdict amounts to a clear violation of this basic right, and is the result of an arbitrary exercise of governmental power by the Supreme Court of the State of Mississippi.

5. Ed Bristow asserts that an examination of the entire proceedings as viewed by the jury and the trial court is essential, and unless this Court or the United States Supreme Court, reads and comprehends the facts of this case, he will be deprived of his fundamental due process. Ed Bristow proved at trial that Life & Casualty Insurance Company manufactured their "arguable reason" and thereby created their specious defense. The jury (6 men and 6 women ranging in age from 22 to 64, comprised of 8 whites and 4 blacks from all walks of life ranging from a housewife to an engineer and teacher) found from the facts that the insurance company had no arguable reason and undoubtedly understood the speciousness of Life & Casualty's defense. Ed Bristow asserts that the fundamental right of trial by jury is more than a mere appendix. Trial by jury is the heart and soul of our legal system, and when Judges are fooled or ignorant of the facts, an injustice has been done to every citizen of our United States.

II.

The Mississippi Supreme Court procedures are inadequate to protect the constitutional rights to trial by jury, which is a basic requirement of the due process clause of the 14th Amendment, for the following reasons:

1. That the procedures of the Mississippi Supreme Court only require that one Judge read the record and that a decision may be made by a three Judge panel voting without the others having read the record.

2. Miss. Sup. Ct. Rule 24 (b) provides that if only one member of the three Judge panel dissents, the case is automatically considered by the full Court en banc. When the Supreme Court considers cases en banc, the Court also considers constitutional questions, cases of first impression, or cases involving important policy decisions. The Court does not ask for separate briefs nor does it hear additional argument when it has cases en banc.

3. Evidently only one Justice reads the entire record with no more than 3 Justices participating in the opinion and decision making process until the Court is en banc. Presumably only one Justice reads the record even if the Court has been en banc. Under these circumstances, Ed Bristow has no way of knowing how many members of this Supreme Court have personally read the entire record in his case.

4. Ed Bristow believes this opinion of the Mississippi Supreme Court is inconsistent with due process of law as granted by the 14th Amendment of the United States Constitution. Ed Bristow requests a certification of each member of the Mississippi Supreme Court as to which member personally read the entire record in this case and which members personally did not read the entire record in this case. Further Ed Bristow requests certification as to each procedural step followed in this case from its Genesis to the present. Ed Bristow's request is based upon a good faith belief that he has been denied his due process rights guaranteed to him under the Mississippi Constitution and the United States Constitution. Ed Bristow further requests that these certifications be entered and made a part of the record in this case in order that the United States Supreme Court has the benefit of a well developed record so that this important issue of right to trial by jury may properly be presented to the United States Supreme Court.

Wherefore, Ed Bristow requests this Court to clarify the opinion in this cause, by making a part of the record the Certification as to which member of the Court read the entire record, and as to which members of the Court did not

read the entire record, and also a listing of the procedural steps followed in this case as it was handled by this Court.

JOHN LEROY LONG
ATTORNEY AT LAW
315 MAGAZINE STREET
TUPELO, MISSISSIPPI 38801
TELEPHONE (601) 842-2364

BY: /s/ John Leroy Long

JOHN LEROY LONG

CERTIFICATE OF SERVICE

I, John Leroy Long, one of the attorneys for Ed Bristow do hereby certify that a true and correct copy of the above and foregoing Request For Certification Or Correction Of Opinion has been forwarded to the Honorable John E. Hughes, III, attorney for Life and Casualty Insurance Company of Tennessee, and the Honorable Frank A. Russell, Learned Circuit Judge of Lee County, Mississippi, by depositing the same in the United States Postal Service with postage prepaid and addressed to their mailing addresses of record.

Certified this 16th day of August, 1988.

/s/ John Leroy Long

JOHN LEROY LONG

APPENDIX E

IN THE
SUPREME COURT OF THE STATE OF MISSISSIPPI

LIFE & CASUALTY INSURANCE COMPANY
OF TENNESSEE *Appellant*

VS. NO. 57, 393

HENRY EDWARD BRISTOW *Appellee*

REQUEST TO STAY THE ISSUANCE OF THE MANDATE

TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI:

Comes now, Ed Bristow, Appellee, in the above styled and numbered cause, by and through his attorney of record, John LeRoy Long and requests the Court to stay the issuance of the mandate in this case and as grounds therefore, states as follows:

I.

The decision and judgment of this Court violates Ed Bristow's fundamental and Constitutional rights to trial by jury and violates fundamental due process. Ed Bristow asserts that the procedures used by the Supreme Court of the State of Mississippi do not require that each justice read the record in each individual case and that Ed Bristow has no reason to believe that the procedure used by this Court was any different in his case. The procedures used by the Supreme Court of the State of Mississippi are in violation of his Constitutional rights dealing with trial by jury as guaranteed by the Mississippi Constitution, Article 3, Section 31, and the due process clause of the Fourteenth Amendment to the United States Constitution, the due process clause of the Fifth Amendment to the United States Constitution, and the

Seventh Amendment to the United States Constitution, and all of the rights afforded Ed Bristow under the common law of the United States and the State of Mississippi.

II.

The opinion and judgment of the Court in this case is not clear and does not adequately reflect the actual facts contained in the record in this case, nor does it adequately reveal the reasoning process underlying the opinion and judgment of this Court. From the face of the opinion in this case it appears that all members of the Court have read the record and voted to reverse and render, whereas Ed Bristow has reason to believe that this has not been done in his case. Ed Bristow believes that the jury in this case, which was composed of a cross-section of the community, was in a position to more accurately and fairly determine the facts in this case than that of eight men and women who are not composed of a cross-section of the community but are experienced and trained in only one field. Ed Bristow asserts, by and through his attorney of record, John LeRoy Long, that a judgment of the jury, as in this case, should stand above the judgment of the Court.

III.

Ed Bristow has previously filed with this Court a request for clarification or correction of opinion and has requested a certification of each member of the Mississippi Supreme Court as to which member personally read the entire record in this case and which members did not personally read the entire record in this case. Also, Ed Bristow has requested a certification as to each procedural step followed by this Court in his case. Ed Bristow requests that this Court stay the issuance of the mandate until his request for clarification or correction of opinion accompanied by the above mentioned certification has been filed in order that the United States Supreme Court has the benefit of a well developed record upon which to review the issue of right to trial by jury.

WHEREFORE, Ed Bristow respectfully prays that his request for stay of the mandate be received and filed and that the Court stay the mandate and decision rendered in this case. Ed Bristow further prays that the stay of the mandate be of sufficient length of time for the Court to review the motion and supplement the record, in order that the United States Supreme Court might review this matter and determine whether or not Ed Bristow's constitutional rights to trial by jury guaranteed by the Mississippi Constitution, Article 3, Section 1 and the due process clause to the Fourteenth Amendment to the United States Constitution and the due process clause of the Fifth Amendment to the United States Constitution and the Seventh Amendment to the United States Constitution and all rights afforded Ed Bristow under the common law of the United States and the State of Mississippi have been violated. Ed Bristow also prays for any other relief which this Court may deem meet and proper.

This the 16 day of August, A.D., 1988.

JOHN LEROY LONG
ATTORNEY AT LAW
315 MAGAZINE STREET
TUPELO, MISSISSIPPI 38801
TELEPHONE (601) 842-2364

BY: /s/ John Leroy Long

JOHN LEROY LONG

CERTIFICATE OF SERVICE

I, John LeRoy Long, one of the attorneys for Ed Bristow do hereby certify that a true and correct copy of the above and foregoing Request To Stay The Issuance Of Mandate has been forwarded to the Honorable John E. Hughes, III, attorney for Life and Casualty Insurance Company of Tennessee, and the Honorable Frank A. Russell, Learned Circuit

Judge of Lee County, Mississippi, by depositing the same in the United States Postal Service with postage prepaid and addressed to their mailing addresses of record.

Certified this 16 day of August, 1988.

/s/ John Leroy Long

JOHN LEROY LONG

APPENDIX F

IN THE SUPREME COURT OF MISSISSIPPI
DECISIONS HANDED DOWN SEPTEMBER 21, 1988

THE COURT SITTING EN BANC:

57,393 Life & Casualty Ins. Co. of Tenn. v. Henry Edward Bristow; Circuit, Lee; Motion for Clarification or Correction of Opinion Overruled. Motion to Stay Mandate Overruled. Hawkins and Dan Lee, P.JJ., and Zuccaro, J., Not Participating.

APPENDIX G

MANDATE FROM THE SUPREME COURT
OF MISSISSIPPI

TO THE CIRCUIT COURT OF LEE COUNTY —
GREETINGS:

On the 20th day of July, 1988, a day of the regular term of the Mississippi Supreme Court, in proceedings held in the Courtroom, in the Gartin Building, in the City of Jackson, Mississippi, the following final judgment was rendered by the Mississippi Supreme Court:

LIFE & CASULATY INS. CO. OF TENNESSEE
#57,393 V.
HENRY EDWARD BRISTOW

This cause having been submitted on the record from the Circuit Court of Lee County, and this Court having considered the same is of the opinion that there is error therein and doth order that the Judgment of said Circuit Court rendered in this cause on the 14th day of October, 1985, be and the same is hereby reversed and rendered.

It is further ordered that Henry Edward Bristow do pay all of the costs of this appeal to be taxed.

YOU ARE THEREFORE HEREBY COMMANDED, that execution and further proceedings be had in furtherance of this judgment, to the ruling of the Mississippi Supreme Court and the law of the State of Mississippi.

WITNESS, the Hon. Roy Noble Lee, Chief Justice of the Mississippi Supreme Court; also the signature of the Clerk and the Seal of said Court hereunto affixed, in the City of Jackson, this the 29th day of September, A.D., 1988.

/s/ Sue Gordon, Clerk

_____

_____, D.C.

Trial Court No.: 18,556

APPENDIX H

IN THE
SUPREME COURT OF THE STATE OF MISSISSIPPI

LIFE & CASUALTY INSURANCE COMPANY
OF TENNESSEE *Appellant*

VS. NO. 57,393

HENRY EDWARD BRISTOW *Appellee*

MOTION FOR COURT TO SUSPEND ITS RULES BASED ON NEWLY DISCOVERED EVIDENCE, CONSIDER AND ALLOW THIS DOCUMENT TO BE A SECOND PETITION FOR REHEARING, WITHDRAW THE OPINION AND MANDATE IN THIS CASE AND FOR SUPREME COURT JUSTICES TO RECUSE AND DISQUALIFY THEMSELVES AND FOR THE CHIEF JUSTICE TO CERTIFY TO THE GOVERNOR THAT THE JUSTICES HAVE DISQUALIFIED THEMSELVES SO INDEPENDENT FAIR MINDED MEN AND WOMEN WITH LAW KNOWLEDGE CAN IMPARTIALLY CONSIDER AND DECIDE THIS CASE DE NOVO

Now comes the Appellee, Henry Edward Bristow, by and through his attorneys, John Leroy Long and Roy O. Parker, and moves the Court to suspend its rules pursuant to Supreme Court Rule 2, *withdraw its opinion and mandate in this case,* consider and allow this motion to be a *second petition for rehearing* supplementing the first petition for rehearing, and for each of the Justices in this case who voted to reverse the jury verdict and render the case in favor of Life and Casualty Insurance Company of Tennessee, but who did not read the transcript of the record to *recuse and disqualify themselves* and take no further action in this case.

Henry Edward Bristow further moves, after the Justices who did not read the record, recuse and disqualify themselves, that Chief Justice, Roy Noble Lee, certify to Governor

Ray Mabus that said Justices have recused and disqualified themselves and request the Governor to appoint nine persons of law knowledge pursuant to Article VI, § 165 of the Mississippi Constitution to read the transcript of the record and decide this case de novo, fairly and impartially, and in support of these motions would show as follows on information, knowledge and belief:

1. Not one of the Justices who voted to reverse the jury verdict and render this case in favor of the insurance company read the transcript of the record in this case.

2. That Cecil Ross is the only one who ever read the record in this case.

3. That Cecil Ross was the law clerk to Justice Reuben Anderson from the time the record was received in this case until the opinion was promulgated on July 20, 1988.

4. That Cecil Ross wrote the memorandum of the facts in this case and briefed the law for Justice Anderson.

5. Article VI, § 150 of the Mississippi Constitution provides that no person shall be eligible to the office of Judge of the Supreme Court who shall not have been a practicing attorney and a citizen of the State for five years immediately preceding such appointment.

6. Cecil Ross did not meet the requirements of Article VI, § 150 of the Mississippi Constitution, because he has not been a practicing attorney for five years.[1]

7. That this Court decided this case based on the memorandum of the law clerk, Cecil Ross, and without the individual Justices reading the record to determine for themselves what the facts were.

8. The decision of the Court in this case was the de facto decision of Cecil Ross, a mere law clerk, and the decision was not the decision of the elected members of the Mississippi Supreme Court.

9. On the 16th day of August, 1988, Appellee filed a motion requesting each Supreme Court Justice to certify that

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[1]Ross was a law clerk for the Mississippi Supreme Court from the time of his graduation from law school on June 1, 1985 until July 31, 1988 and has never practiced law.

he or she had or had not read the transcript of the record and to certify to the procedures the Court followed in this case.

10. The members of the Court refused to certify that they had or had not read the record and refused to certify as to their procedures in this case before rendering their decision, and on September 21, 1988, the Court summarily overruled Appellee's motion.

11. The failure of each Justice, who voted to reverse and render this case, to certify that he or she had read the record in this case before voting to take the Six Million Fifty Thousand Dollar ($6,050,000.00) jury verdict away from Henry Edward Bristow raises the presumption that none of the Justices read the record. The Court's decision is also contrary to the standard of review adopted by the Court which is succinctly stated in paragraph 15.3 of Luther T. Munford's *Mississippi Supreme Court Practice* (1987), which is quoted verbatim as follows:

> **15.3 Review of Jury Verdict in a Civil Case**
>
> The trial court is presented with three opportunities to take a civil case away from the jury after trial begins. These are i) the motion for a directed verdict at the close of the plaintiff's case, ii) the motion for a directed verdict at the end of all the evidence, and iii) the motion for judgment notwithstanding the verdict.[14] The standard for granting the motions is the same for both the Supreme Court and the trial court.[15] That standard has been stated as follows:
>
> > [T]he trial court must consider all of the evidence — not just evidence which supports the non-movant's case — in the light most favorable to the party opposed to the motion. The non-movant must also be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. If the facts and inferences so considered point so overwhelmingly in favor of the movant that reasonable men could not have arrived at a contrary verdict, granting the motion is required. On the other hand, if there is substantial evidence of such quality and weight that reasonable

and fairminded men in the exercise of impartial judgment might reach different conclusions, the motion should be denied and the jury's verdict allowed to stand.[16]

Motions for a new trial,[17] on the other hand, are addressed to the sound discretion of the trial court and require a lesser showing before they can be sustained than the motion for j.n.o.v.[18] Defendants should be aware that if a defendant appeals a new trial granted because damages were inadequate, the defendant is deemed to have admitted liability and the Court will not review any alleged errors relevant to liability.[19]

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[14]Miss. R. Civ. P. 50; Ch. 3.3. *supra*

[15]The same standard applies to each of these motions. *Litton Systems Inc. v. Enochs*, 449 So.2d 1213, 1214 (Miss. 1984).

[16]*Stubblefield v. Jesco*, 464 So.2d 47, 54 (Miss. 1984) quoting *Jesco, Inc. v. Whitehead*, 451 So.2d 706, 713-14 (Miss. 1984) (Robertson, J. concurring). See also *City of Jackson v. Locklar*, 431 So.2d 475, 478 (Miss. 1983); *Paymaster Oil Mill Co. v. Mitchell*, 319 So.2d 652, 657 (Miss. 1975).

[17]Miss. R. Civ. P. 59.

[18]*Anchor Coatings, Inc. v. Marine Industrial Residential Insulation, Inc.*, 490 So.2d 1210, 1215 (Miss. 1986); *Clark v. Columbus & Greenville Railway Co.*, 473 So.2d 947, 950 (Miss. 1985).

[19]*City of Jackson v. Ainsworth*, 462 So.2d 325, 327 (Miss. 1984); *Schoppe v. Applied Chemicals Div.*, 418 So.2d 833, 836 (Miss. 1982).

12. Canon Three of the Code of Judicial Conduct provides the judicial duties of a Judge take precedent over all of his other activities. The Justices of the Mississippi Supreme Court usually only work at the Court three and one half to four days each week when they are not on vacation. The Court does not usually convene on Mondays until after lunch and it does not usually work on Fridays.

13. The failure of each Justice to read the record in this case, to certify their procedures, together with the fact that they only work part time (at least one Justice has a part time teaching job with the University of Mississippi[2]), constitutes a neglect of duty on the part of any Justice who voted to reverse this case but who did not read the record and such conduct violated Article VI, § 175 of the Mississippi Constitution and is an arbitrary and capricious exercise of Governmental power by the Mississippi Supreme Court. It is also a violation of the due process clauses of the V and XIV Amendments of the United States Constitution, the VII Amendment of the United States Constitution, Article III § 31 of the Mississippi Constitution and all of the rights afforded to Henry Edward Bristow under the common law of the United States and the State of Mississippi.

14. Henry Edward Bristow has been denied a fair and impartial hearing before this Mississippi Supreme Court in that eight Justices of this Court (Judge Zaccharo took no part in the decision) reversed the Six Million Fifty Thousand Dollar($6,050,000.00) jury verdict in favor of Henry Edward Bristow and gave the money back to Life and Casualty Insurance Company of Tennessee without having read the record.

15. The overruling of Henry Edward Bristow's motion requesting certification of which Justices read the record in this case and to certify as to each procedural step in this case from its genesis to the present time violates a fundamental principle of justice rooted in the traditions and conscience of all Americans in that this prevented Henry Edward Bristow from making his record in this case for the United States Supreme Court to consider. The procedures used by the Supreme Court of the State of Mississippi are in violation of his Constitutional rights dealing with trial by jury as guaranteed by the Mississippi Constitution, Article III, § 31, and the due process clause of the XIV Amendment to the United States Constitution, the due process clause of the V Amend-

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[2]Justice James L. Robertson teaches at the University of Mississippi Law School on Fridays.

ment to the United States Constitution, and the VII Amendment to the United States Constitution, and all of the rights afforded to Henry Edward Bristow under the common law of the United States and the State of Mississippi.

16. An American citizen's right to trial by jury is basic and fundamental and this Court's reversal and rendering of Henry Edward Bristow's jury verdict without having read the record, is a clear violation of this basic right, and it is the result of an arbitrary exercise of governmental power by the Supreme Court of the State of Mississippi and it is the product of wilful neglect on the part of the Mississippi Supreme Court.

17. The Mississippi Supreme Court has no organized internal operating procedures as evidenced by a letter to Roy O. Parker from Amy Whitten, Court Administrator, dated the 19th day of August, 1988. Said letter is made a part hereof the same as though it were copied herein in words and figures and is marked Exhibit "1". The Supreme Court of Mississippi has no procedures which it strictly or regularly follows, therefore, this second petition for rehearing should be considered, allowed and sustained by this Court.

18. The informal internal operating procedures of this Court are unconstitutional and did not afford Henry Edward Bristow due process of law and denied him a trial by a jury. The procedures of the Supreme Court are outlined in Justice Anderson's article printed in the "Defense Law Journal" dated October 1, 1986 and it is attached hereto and made a part of this motion the same as though it were copied herein in words and figures and is marked Exhibit "2". The affidavit of John Leroy Long regarding the procedures of the Mississippi Supreme Court as told to him and Roy O. Parker by an unnamed former law clerk who recently worked for the Mississippi Supreme Court is attached hereto and is made a part hereof the same as though it were copied herein in words and figures and is marked Exhibit "3". The procedure of the law clerks of the Supreme Court arbitrarily selecting and dividing up the cases is improper as well as it gives the appearance of impropriety. When the law clerks arbitrarily select and divide the cases among themselves this

automatically assigns the cases they select to the Judge for whom they work. This procedure permits the law clerks to ostensibly have great influence on the outcome of a particular case because law clerks write the memorandum outlining the facts in the case for the Judge for whom they work. According to the procudure outlined in Justice Anderson's article in the "Defense Law Journal," Exhibit "2" to this motion, eight of the Judges don't read the record. These procedures violated Henry Edward Bristow's and all other persons similarly situated, Constitutional rights to due process of law as guaranteed by the V and XIV Amendments to the United States Constitution as well as his rights and all other persons similarly situated, to a trial by jury pursuant to Article III, § 31 of the Mississippi Constitution and the VII Amendment to the United States Constitution.

19. After the Petition For Rehearing was denied in this case, Roy O. Parker, one of Plaintiff's counsel talked to Justice James L. Robertson about the procedural matters in this case. Justice Robertson who voted to reverse the jury verdict and render the decision in favor of the insurance company admitted that he had not read the record. See the affidavit of Roy O. Parker attached hereto. Said affidavit is made a part hereof the same as though it were copied herein in words and figures and it is marked Exhibit "4". For the first time, Henry Edward Bristow had newly discovered evidence that a Supreme Court Justice had not read the record.

20. Justice Robertson, a Harvard Law School graduate and ostensibly the most intellectual member of the Court, and without doubt the most prolific writer, admitted he had not read the record. The rest of the Court was thus deprived of the benefit of his informed counsel.

21. The Court without having read the transcript of the lower Court record, made the following statement on page 8 of its opinion:

> There is absolutely nothing in this record upon which a finding could be based. This was simply not a case for punitive damages.

When the Court made this statement, without having read the record, it violated Henry Edward Bristow's Constitu-

tional rights to due process of law guaranteed by the XIV Amendment of the United States Constitution, Article III, § 31 of the Mississippi Constitution, the due process clause of the V Amendment of the United States Constitution, the VII Amendment of the United States Constitution, and all of the rights afforded Henry Edward Bristow under the common law of the United States and the State of Mississippi.

22. To reverse a case without reading the record and to fail to supplement the record by certifying its procedures in order to provide the United States Supreme Court with a well developed record upon which to review the issue of the Constitutional adequacy of the Mississippi Supreme Court procedures is proof positive of bias, passion and prejudice on the part of the Court. Such conduct on the part of the Court shocks the conscience of all fair minded people and that conduct violated Henry Edward Bristow's Constitutional right to due process of law guaranteed by the XIV Amendment of the United States Constitution, Article III, § 31 of the Mississippi Constitution, the due process clause of the V Amendment of the United States Constitution, the VII Amendment of the United States Constitution, and all of the rights afforded Henry Edward Bristow under the common law of the United States and the State of Mississippi. These procedures also violate the Constitutional rights of all other persons who have appealed or who will appeal cases to the Mississippi Supreme Court in the future.

23. In the event the Court does not sustain this motion and recuse themselves, Appellee moves for a public evidentiary hearing in this case in order to determine which Justices read the record, the procedural aspects that were used in deciding this case, how the case was assigned to Justice Anderson, and the procedures for the assignment of the cases and all of the other procedures that were followed in this case from the date that the record was received until it was decided by the Court. The Appellee will expect to call the Supreme Court Justices as witnesses as well as various law clerks and, therefore, Appellee moves that the Justices recuse and disqualify themselves because they will be witnesses in this hearing.

24. Appellees further move that the Court furnish to the Appellee all documents that the Supreme Court has actually reviewed including the law clerk's memorandum in this case.

Respectfully submitted, this the 6th day of October, A.D., 1988.

JOHN LEROY LONG
ATTORNEY AT LAW
311 MAGAZINE STREET
TUPELO, MS 38801
TELEPHONE: (601) 842-2364

BY: /s/ John Leroy Long

JOHN LEROY LONG
One of the Attorneys for
the Appellee

ROY O. PARKER AND ASSOCIATES
ATTORNEYS AT LAW
200 NORTH SPRING STREET
POST OFFICE BOX 92
TUPELO, MISSISSIPPI 38802-0092
TELEPHONE: (601) 842-4112

BY: /s/ Roy O. Parker

ROY O. PARKER
One of the Attorneys for
the Appellee

CERTIFICATE OF SERVICE

This is to certify that I, Roy O. Parker, have this day mailed a copy of the above and foregoing Motion For Court To Suspend Its Rules Based On Newly Discovered Evidence, Consider And Allow This Document To Be A Second Petition For Rehearing, Withdraw The Opinion And Mandate In This Case And For Supreme Court Justices To Recuse And Disqualify Themselves And For the Chief Jus-

tice To Certify To The Governor That The Justices Have Disqualified Themselves So Independent Fair Minded Men And Women With Law Knowledge Can Impartially Consider And Decide This Case De Novo to Hon. William M. Beasley and Hon. John Hughes, III, Attorneys at Law, by depositing same in the United States Mail, postage prepaid, and mailing to them at their usual office addresses of P.O. Box 29, Tupelo, Mississippi 38802 and P.O. Box 131, Jackson, Mississippi 39205, respectively.

I further certify that I have this day also mailed a true and correct copy of the above and foregoing to Hon. Frank A. Russell, Circuit Judge, by depositing same in the United States Mail, postage prepaid to him at his usual mailing address of P.O. Box 757, Fulton, Mississippi 38843.

This the 6th day of October, A.D., 1988.

ROY O. PARKER AND ASSOCIATES
ATTORNEYS AT LAW
200 NORTH SPRING STREET
POST OFFICE BOX 92
TUPELO, MISSISSIPPI 38802-0092
TELEPHONE: (601) 842-4112

BY: /s/ Roy O. Parker

ROY O. PARKER
Attorney for the Appellee

EXHIBIT I

SUPREME COURT OF MISSISSIPPI
POST OFFICE BOX 117
JACKSON, MISSISSIPPI 39205
TELEPHONE (601) 359-3697

ROY NOBLE LEE
Chief Justice

ARMIS E. HAWKINS
DAN M. LEE
Presiding Justices

LENORE L. PRATHER
JAMES L. ROBERTSON
MICHAEL D. SULLIVAN
REUBEN V. ANDERSON
J. RUBLE GRIFFIN
JOSEPH B. ZUCCARO
Justices

AMY D. WHITTEN
Court Administrator

August 19, 1988

Roy O. Parker, Esq.
P.O. Box 92
Tupelo, MS 38802-0092
Re: Supreme Court Internal
Operating Procedures

Dear Roy:

I am in receipt of your letter requesting the Court's internal operating rules and regret to admit that such are not codified or in a form subject to public release. The Court's internal procedure has been derived from decisions reached by the *en banc* conference and more or less falls into the realm of custom and usage rules.

I will be happy to talk with you regarding any specific procedures in which you might be interested. Feel free to contact me if I can provide you with information.

Sincerely,

/s/ Amy
Amy D. Whitten
Counsel & Court Administrator

ADW/bhm
cc: Sue Gordon
Supreme Court Clerk

EXHIBIT 2

THE MDLA Quarterly

The Newsletter of The Mississippi Defense Lawyers Association

Vol. 8 October 1986 No. 4

How the Supreme Court Operates
by Reuben V. Anderson

In contemplating my approach to summarizing the mechanics of the decision-making process of the Court, I decided to do something totally out of character for one in the legal profession — I decided to make it short and simple.

There are nine Supreme Court Justices. A Chief Justice and two Presiding Justices, whose positions are determined by seniority. The Chief Justice is responsible for the administration of the Court and is chairman of the Court, so to speak.

The Court hears most cases in panels of three with the Chief or a Presiding Justice on each panel. The Presiding Justice keeps records and is chief of the panel. The members of the panels usually change each month.

Each Justice is assigned a number of argued and submitted cases each week. The Justice who is assigned a case is responsible for reading all briefs, reply briefs, records, clerk's memo and any and all other materials. He also rules on any motions that may be presented in the case. In addition to his assigned caseload, each Justice also serves as "check judge" or "panel judge" for the other judges on his panel. The "Check Judge" reads all briefs, the abstract of the record, the clerk's memo and basically checks behind the assigned judge. The "panel judge" reads the memo in the case and will be responsible for the case on Petition for Rehearing, if one is filed.

After oral argument or on designated conference days for submitted cases, the assigned judge discusses the facts and the law of the case with the panel and makes a recommendation as to the outcome of the case. If there is any disagreement by a justice on the panel, the case will go before the full

court. If the three judge panel members concur in the case, the assigned justice writes an opinion, if necessary. This opinion is circulated to the other eight justices for review. If a justice has a different view, he can pull the case, necessitating a discussion before the Court en banc.

Other matters requiring hearing en banc are (1) all Petitions for Rehearing, (2) Constitutional questions, (3) overruling a previous case, (4) capital murder cases, (5) cases of first impression in Mississippi, and (6) cases involving important policy decisions.

The assigned justice presents the case and after full discussion, including opposing views, the en banc conference votes. The position with the majority of votes prevails. Those justices in the minority may submit a dissenting opinion. If the Court is divided 4-4 (if for example one justice does not participate) the judgment of the lower court is affirmed. A 4-4 decision does not however, establish a precedent.

A judge may change his vote, pull an opinion or request additional conference, if, after further consideration, he believes his first vote was in error. The opinion is not final until handed down and is still subject to change on rehearing.

The Court may issue published or unpublished opinions or per curiam decisions. An opinion is written and may be published or unpublished in criminal cases where the sentence exceeds ten years. In other cases where there is no new question of law or policy, the opinion may be unpublished or the case affirmed per curiam without opinion. Reversal of any lower court decision requires a written opinion and in cases where a dissent is filed, the majority opinion must be published.

Each Justice has two law clerks. Their duties are to read all briefs and records in the case prior to the judge receiving it and prepare a memorandum of the case outlining the facts and discussing the law on each assignment of error. Each Justice assigns his law clerks a variety of other duties, usually involving legal research, as the occasion demands.

Cases are sent to the Court each month for assignment from the Supreme Court Clerk's office. Those cases are selected by assigned docket numbers, given in order of the

date the record is received from the bindery, with the oldest docket number being the first sent to the Court.

A check is made to determine which cases a judge may not be eligible to hear, for such reasons, if he had been the lower court judge or a member of the law firm representing one of the parties to the suit. The Judge's caseload is drawn in the order of seniority on a random draw from the pool of cases he can hear.

Judges who choose to take extra cases in addition to those assigned may select cases from the clerk's office at random and not necessarily in accord with the docket number system.

Motions may be handled by an individual justice, a panel or en banc conference as the magnitude of the motion requires.

There are certain types of cases assigned to members of the Court in rotation rather than by random draw. These include: (1) utility rate cases from the Public Service Commission, (2) capital murder cases, (3) election contests, (4) disbarment proceedings, and (5) Fifth Circuit certification questions.

In an effort to expedite Court business, we have adopted Supreme Court Rule 50 providing that where the record is filed with ~~the Clerk on~~ or after January 1, 1986, parties desiring oral argument shall request same and file with their initial briefs a one page or less statement explaining why oral argument will be helpful to the Court. The Court then determines if argument will be granted or denied.

In cases filed before January 1986, and still pending before the Court, the records and briefs will be previewed and the Court will determine and advise counsel whether argument will be granted.

The Court may in its discretion limit the issues to be argued and the amount of time allowed for argument to each side — not to exceed thirty minutes.

Oral argument is granted in all death penalty cases without necessity of filing the stated request.

In 1986 the Court will hear and dispose of more than 550 cases, which averages more than 60 cases per judge on the Court. In addition to the other matters assigned to Judges,

such as petitions for rehearing, motions, Fifth Circuit certification questions, as of June 30, 1986, there were approximately 1,050 cases pending — constituting about a two year workload.

There were 805 cases filed in 1985, to date we have had 677 filed for this year.

A synopsis of the 1985 workload of the Court follows:

(1) During 1985, the Court disposed of 672 cases on the merits, 183 more than in 1984. (2) We handled 576 petitions, an increase of 10 from 1984. (3) We disposed of 1,904 cases, petitions and motions in 1985, an increase of 276 over the previous year. (4) There were 419 civil and 386 criminal cases filed. (5) Oral argument was heard in 282 cases or 42%. (6) Of the 672 cases rendered on the merits in 1985, 475 or 71% were affirmed; 147 or 22% were reversed, 45 or 7% were affirmed in part and reversed in part. (7) 410 cases or 61% were decided by written opinion, while 262 or 39% were decided without a written opinion. (8) The average length of time from date of judgment in the lower court until decision by this Court was 706 days compared with 631 in 1984. (9) From the date the record was filed with this Court until the decision was rendered averaged 443 days compared with 452 in 1984. (10) An average of 406 days elapsed between the time the record was filed until the case was submitted to the Court, compared with 417 in 1984. (11) The time from the date the case was at issue and submitted to the Court until the final decision was rendered averaged 37 days, compared to 35 days in 1984.

As of December 31, 1984, there were 1071 cases pending; on December 31, 1985, there were 1033 cases pending; and on June 30, 1986, there were 1050 cases pending in addition to other matters assigned to judges, such as petitions, motions, post-conviction remedies, and Fifth Circuit Certification questions.

I hope that this brief explanation of the mechanics of the Court's operation will be helpful to the bar. Much has been said and written about the Court's backlog and we are ever mindful of how important the impartial disposition of cases are to the bar and the public. We are constantly looking for

ways to improve our procedure. We welcome suggestions from the bar and hope that some of the changes that we have instituted will show positive results in the near future.

[*This article is from a speech delivered by Justice Anderson in June of 1986.*]

EXHIBIT 3

AFFIDAVIT

STATE OF MISSISSIPPI
COUNTY OF LEE

Personally appeared before me the undersigned authority the within named John Leroy Long, Attorney at Law, residing at Saltillo, Mississippi, who after being duly sworn states as follows:

1. A former law clerk of the Mississippi Supreme Court, who asked not to be named, told me and Roy O. Parker the following:

2. During the time I was a law clerk for the Mississippi Supreme Court cases were not randomly assigned to the judges. About thirty days before oral argument the clerk of the Mississippi Supreme Court would bring the record of the cases upstairs and put them on a table and the law clerks would actually select the cases and divide them out any way they chose.

3. The Justices of the Supreme Court worked at the Court only three and one half to four days per week and they rarely ever worked on Fridays.

4. The procedure in the Mississippi Supreme Court was for the law clerk of the judge who was assigned to write the opinion (the record judge) in the case to first read the record. The law clerk then would summarize the facts and the points of law and submit this to the record judge. This memorandum by the law clerk was used as a basis for the facts in the case by all of the other judges on the panel. When the case was presented to the Court en banc the only Judge, according to the procedure, who would have read the record, would be the record judge. The other judges used the memorandum of the law clerk to determine what the facts were.

5. On several occasions when I worked for the Court, the Court would decide cases before oral argument and some-

times the opinion was being typed while the attorneys were arguing orally before the Court.

6. I will testify under oath to the above facts if I am subpoenaed before a court, however, I am reluctant to sign an affidavit, because I am not sure if I should sign one.

This the 6th day of October, A.D., 1988.

/s/ John Leroy Long

JOHN LEROY LONG

SWORN TO AND SUBSCRIBED BEFORE ME, this the 6th day of October, A.D., 1988.

/s/ Martha Kessinger

NOTARY PUBLIC

My Commission Expires:
5/17/91

EXHIBIT 4

AFFIDAVIT

STATE OF MISSISSIPPI
COUNTY OF LEE

Personally appeared before me the undersigned authority the within named Roy O. Parker, Attorney at Law, residing at 2505 Savery Drive, Tupelo, Mississippi, who after being duly sworn states as follows:

1. I am one of the attorneys for Henry Edward Bristow in the case of *Life and Casualty Insurance Company of Tennessee, Appellant vs. Henry Edward Bristow, Appellee,* number 57,393, in the Supreme Court of the State of Mississippi.

2. I helped try the case and I am familiar with all aspects of the trial and the appeal to the Mississippi Supreme Court.

3. After the Petition For Rehearing had been denied in this case, I made an appointment with Justice James L. Robertson at his home in Oxford, Mississippi, and asked if it would be unethical or illegal to talk to him about this case since the Petition For Rehearing had been denied. He stated that he would talk to me about the procedural aspects of how the case was handled but would not discuss the merits of the case. I agreed because I only wanted to find out the procedural aspects of the case and during our discussion I stated to him that I didn't see how the Supreme Court could reverse this case and render it in favor of Life and Casualty Insurance Company of Tennessee without the Justices first having read the record. He voluntarily stated that he had not read the record in the case even tough he had voted to reverse the jury verdict and render the case for the insurance company. I indicated to him that we were planning to appeal this case to the United States Supreme Court and he said that he had not read the record in the case and that the United States Supreme Court would not read the record. After he stated this I returned to Tupelo and discussed with co-counsel, John Leroy Long, my conversation with Justice Robertson. We determined at that time to request the Court to certify as

to which members had or had not read the record in the case and also to certify the procedures that the Mississippi Supreme Court followed in this case. We made this request and it was overruled without opinion by the Supreme Court of Mississippi on the 21st day of September, 1988. Since the Court declined to certify as to whether or not each member had read the record, it was determined by us to file the present motion in order to clarify the issues and contest the Constitutional adequacy of the procedures of the Mississippi Supreme Court in this case. We had also determined that the Mississippi Supreme Court had no internal operating procedures which it regularly and strictly followed and we believe that the action the Court took in this case violated Henry Edward Bristow's Constitutional rights to a fair and impartial hearing before the Mississippi Supreme Court.

This the 4th day of October, A.D., 1988.

/s/ Roy O. Parker

ROY O PARKER

SWORN TO AND SUBSCRIBED BEFORE ME, this the 4th day of October, A.D., 1988.

/s/ Martha Kessinger

NOTARY PUBLIC

My Commision Expires:
5/17/91

APPENDIX I

IN THE SUPREME COURT OF MISSISSIPPI
DECISIONS HANDED DOWN OCTOBER 26, 1988

THE COURT SITTING EN BANC:

57,393 Life & Casualty Insurance Company of Tennessee v. Henry Edward Bristow; Circuit, Lee; Motion of Henry Edward Bristow to Suspend Its Rules, etc., and All Other Interrelated Relief Overruled.